82-2014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. .....

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WELLS, PEYTON, BEARD, GREENBERG, HUNT AND CRAWFORD
624 Petroleum Building
P.O. Box 3708
Beaumont, TX 77704
(409) 838-2644
Attorneys for Petitioner South Park Independent School District

Of Counsel:
TANNER T. HUNT, JR.
P.O. Box 3708
Beaumont, TX 77704

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that a district court-ordered student assignment plan requiring "perfect racial balance" is constitutionally permissible.

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Petitioner South Park Independent School District respectfully prays that a writ of certiorari issue from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 699 F.2d 1291. It is reproduced as Appendix A hereto. The most recent opinion on remand of the District Court for the Eastern District of Texas is reproduced as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered March 1, 1983; this petition has been filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that a district court-ordered student assignment plan requiring "perfect racial balance" is constitutionally permissible.

STATEMENT OF THE CASE

Petitioner South Park Independent School District encompasses a densely populated area that includes part of the City of Beaumont, Texas, and an adjoining area. In 1970, when this litigation began, petitioner operated twenty schools (three high schools, four junior high schools, and thirteen elementary schools) with over 13,000 students, of whom approximately 32 percent were black. Since that time, enrollment has steadily declined to less than 10,000 students, 39 percent of whom are black, based on 1981-82 enrollment figures. "Clearly, the students leaving the school system are white. There has been a greater number of departures in each year that a court order has been handed down. The lines have been long at the local private schools in anticipation of the order, and most are reported to be at capacity this fall. The predominantly white surrounding school districts have experienced rapid growth, and have provided landing strips for white flights." App. B. 5.

1. The district court's 1970 decision and order.

The Attorney General of the United States began this action in 1970 by filing a complaint pursuant to the 1964 Civil Rights Act (42 U.S. C. § 2000c-6(a) and (b)).[1] At that time petitioner was operating pursuant to a freedom of choice plan. After a

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[1] Section 407 of the Act (42 U.S.C. 2000c-6(a)) authorizes the Attorney General to institute "desegregation" actions. Section 401 (42 U.S.C 2000c(b)) provides:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

hearing and the submission of desegregation plans by the parties, the district court on August 31, 1970, entered an order for "the immediate implementation of a school integration plan designed to establish a unitary school system in the South Park Independent School District." R. 62.

The district court's 1970 order specifically set forth the required attendance zone boundaries for each of petitioner's schools and required petitioner to adopt and implement a majority-to-minority transfer policy, allowing free student transfers where the effect would be to increase integration, with the required transportation to be provided by the school district whenever possible and with space to be made available to transferring students on a priority basis. The court also ordered petitioner to assign faculty and staff so that "the ratios of black to white teachers and staff in that district school are substantially the same as the present district-wide ratio of faculty and staff, allowing a five (5%) tolerance factor." R. 68.

The district court's 1970 order became final upon the failure of either party to take an appeal.

2. The government's challenge to the 1970 order.

Almost six years later, by letter of April 15, 1976, the Civil Rights Division of the Department of Justice advised petitioner that it "believe[d] that additional steps need to be taken in order to bring the district into compliance with federal law." R. 103. The basis for this belief was stated to be that "Information presently available to this office indicates that the desegregation anticipated under court order has not materialized, and that in fact there are now six schools in the district which are over 85% black. In addition, there are presently six public schools in the system which enroll over 90% white students." R. 104.

This was the first indication by any agency of the United States of any dissatisfaction with the operation of the school district since 1970. For each academic year since 1970, the

Department of Health, Education and Welfare had certified that the school district was operating in compliance with the requirements of the 1964 Civil Rights Act. R. 401.

By letter of June 24, 1976, petitioner replied that it had operated and was operating in full compliance with the district court's 1970 order. R. 109. In July 1976 the government filed a "Motion for Supplementary Relief" in the district court, requesting "an order requiring the South Park Independent School District to develop, adopt and implement a comprehensive school desegregation plan which fully satisfies the requirements of the United States Constitution." R. 75.

The government did not allege that petitioner was not in full compliance with the district court's 1970 order or that the government had received any complaint from any student or parent in the school district regarding the school district's operation. The government relied instead solely on a statistical showing of racial imbalance in certain schools. R. 79-81.

Petitioner opposed the government's motion on the grounds, among others, that petitioner was in full compliance with the court's 1970 order and that to the extent that the integrative effects of the court's order differed in any way from those expected in 1970, it was the result of population movements beyond petitioner's control. A motion to intervene was filed by a group called Freedom of Choice, composed of some 1,500 parents and students in the school district, also urging that the government's motion be denied. R. 115.

Hearings were held in August 1976, at which only petitioner offered the testimony of witnesses. On September 9, 1976, the district court entered its opinion and order, with findings and conclusions, denying the government's motion. At the same time, the court granted, in open court, the motion of the Freedom of Choice group to intervene for the purposes of any appeal. No. 76-3669, Record on Appeal, Vol. II, p. 128.

3. The district court's 1976 decision.

The district court denied the government's motion for supplementary relief on two grounds. First, the court found that petitioner had "fully complied with this Court's order of August 31, 1970, from date of entry to the present" and that the government "has failed to establish that the integration order entered by this Court on August 31, 1970, is constitutionally flawed." R. 403. The court noted that "the Department of Health, Education and Welfare, an agency of plaintiff charged with such responsibility, has approved student integration procedures in defendant district in each academic school year from entry of the Court's order to the present, and, prospectively, for academic school year 1977-78." R. 401. The court further found that "while specific desegregative effects" anticipated in the 1970 order "may not have been fully realized," "the overall, district-wide desegregative effects of that order have been greater than were anticipated" and that any differences were "the result of shifting residential patterns, attendance of some district students at private schools, and other factors beyond the control of defendant . . . ." R. 401. Finally, the district court found:

> Since entry of this Court's order of August 31, 1970, defendant district has taken no affirmative action with segregative intent, nor has it deliberately refrained from taking any affirmative action within the scope of such order which, if taken, would have increased desegregative results. Student assignments to individual classes at South Park High School and in the other schools of defendant district have consistently been made without regard to race, color, or national origin, and the method of student class assignment employed by defendant has had a definite desegregative effect.

R. 401-402.

Second, the district court denied the government's motion for supplementary relief on the ground that the government had failed to comply with the notice requirement of Section 259 of

the Equal Educational Opportunity Act of 1974. 20 U.S.C. § 1758. Section 259 prohibits federal courts from ordering modification of a court-approved desegregation plan until the school district has been provided "notice of the details of the violation" alleged, *i.e.*, "a denial of equal educational opportunity or a denial of equal protection of the laws," and given an opportunity to develop a voluntary plan and time to permit community participation in the development of a new plan. The court held:

> Plaintiff has failed to satisfy the requirements of 20 U.S.C.A. 1758 with respect to providing notice to defendant district of the details of any violation of equal educational opportunity or of equal protection of law. Thus, defendant has not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therein. Accordingly, this Court is prohibited under the provisions of 20 U.S.C.A. 1758 from granting plaintiff's motion for supplementary relief.

R. 402.

4. The court of appeals' 1978 decision:

On appeal by the government, the Court of Appeals for the Fifth Circuit reversed the district court's 1976 decision. *United States* v. *South Park Independent School District*, 566 F.2d 1221 (1978). The court of appeals found that "at no time prior to the 1976 order presently under attack, had a finding been made by the district court as to the attainment of a 'unitary' system by the SPISD," and that "given these circumstances, the parties are bound by the intervening opinions of the Court of Appeals and the United States Supreme Court" which, the court believed, outlined "new guidelines and requirements" for school desegregation cases. *Id.* at 1225. Under this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the court of appeals held, the "existence of one-race schools" made it "necessary to remand this case to the district court for supplemental findings of fact in order to determine

whether or not the SPISD is in fact a 'unitary' school system." 566 F.2d at 1225.

The court of appeals also held that Section 259 of the Equal Educational Opportunity Act of 1974 (20 U.S.C. 1758) "is not controlling," because "No judicial ruling had been made concerning the attainment of a 'unitary' system." 566 F.2d at 1226. In any event, the court said the Department of Justice's letter of April 15, 1976, complied with the notice requirements of Section 259 because that letter advised that "the Department felt additional steps necessary to bring the district into compliance with federal law," "pointed out . . . that the one-race, or predominantly one-race, status of twelve of the district's schools was the primary concern of the government," and "explained that the Department of Justice felt that the particular feeder pattern of elementary to junior high to senior high schools used by the school district was the chief cause for these one-race schools." *Ibid.* The court of appeals, therefore, was "unable to see how the government could have better complied with the notice provisions of the statute." *Ibid.*

A petition by the school district for a writ of certiorari was denied by the Court on December 4, 1978, Justice Rehnquist dissenting in an opinion joined by Judge Powell. 439 U.S. 1007.

5. The district court's 1980 decision on remand.

On remand, further evidentiary hearings were held from December 3-6, 1979. Forty-nine witnesses testified. On June 6, 1980, the district court entered its opinion and order, again denying the government's motion for supplementary relief. The court again found that petitioner school district was unitary in all respects and that the government had failed to comply with the notice requirements of Section 259 of the Equal Educational Opportunity Act of 1974.

The district court again found that petitioner had fully complied with the court's 1970 order, from which the government

had not appealed, requiring by its explicit terms "the immediate implementation of a school integration plan designed to establish a unitary school system in South Park Independent School District." App. C. 8. "The evidence presented at both the 1976 and the 1979 hearings clearly established," the court found, "that no action or inaction by the District since the entry of the desegregation Order had, as a natural and foreseeable consequence, a segregative effect on the student body within any school or the District" and that "Indeed, there was evidence presented during the 1979 hearing which established that the District had taken several steps to increase the overall level of student desegregation." App. C. 12-13. Petitioner had acted to increase integration, for example, by rotating its secondary school summer program among the district's three high schools, by promoting the majority-to-minority transfer option in local newspapers and in the schools, and by the scheduling of different vocational, language, and other courses in the three high schools. App. C. 13.

On the basis of expert testimony, the district court found that the difference between the racial composition of certain schools in 1979 and the racial composition contemplated by the 1970 order was due solely to changes in residential patterns in the nine-year period; the mass exodus of white students from some school attendance zones; a continuing decline in total school enrollment with almost 10 percent increase in the proportion of black students; and the decision of some students to attend private schools. App. C. 11-12. For example, two densely populated areas changed from predominantly white to predominantly black, affecting the racial composition of two elementary schools, a middle school, and a high school. App. C. 12. "Clearly," the Court found, "that certain schools are currently attended by students of predominantly one race is not the result of present or past discriminatory action by the District or by Texas." App. C. 11.

The district court also reiterated its earlier holding — which it believed the court of appeals had misunderstood — that the government's motion for supplementary relief had "failed to provide notice to SPISD of the details of any violation of equal educational opportunity or equal protection of the laws as required by section 259 of the Equal Educational Opportunity Act of 1974." App. C. 16. The court therefore found itself "foreclosed by the language and intent of the Act from 'enter[ing] . . . any order for . . . modification of [the] court-approved plan.' 20 U.S.C. § 1758." App. C. 16-17.

6. The court of appeals' 1981 decision.

On a second appeal by the government, the court of appeals again reversed the district court's decision that petitioner's school system was unitary. Although it purported to recognize that under Federal Rule of Civil Procedure 52(a) the factual findings of a district court may not be set aside unless found to be "Clearly erroneous," the court of appeals did not disapprove or even specifically review the district court's factual findings. For example, the court of appeals did not question the district court's finding that the racial composition of petitioner's schools "is not the result of present or past discriminatory action by the District or by Texas." The court of appeals this time based its reversal on a legal theory that made the district court's findings irrelevant. Under this Court's decision in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), the court of appeals held, the existence of a unitary system depends on "six criteria: faculty, staff, student bodies, facilities, extracurricular activities and transportation" and that, as a matter of law, "in order to achieve a unitary status the school district must be fully integrated in all six respects. *Id.*, at 435." App. D. 4-5. "The most telling evidence introduced in this case" on the issue of whether petitioner has achieved a unitary system, the court of appeals therefore found, "is the attendance figures for the district schools." App. D. 4. "Here," the court said, "the simple

numerical evidence of student enrollment reflects the effect or lack thereof, of the desegregation plan." App. D. 6. In sum, the court of appeals held that as a matter of law petitioner can not have achieved a unitary system, despite the factual findings of the district court, because petitioner had not achieved numerical racial balance in all aspects of the school system, regardless of the source of the existing imbalance.

The court of appeals also reversed again the district court's finding that the government's motion for supplementary relief must be denied because of the government's failure to comply with the notice requirements of the Equal Educational Opportunity Act of 1974. Without considering the district court's further statement of its findings and holding on this issue, the court of appeals reversed that holding on the basis of "the doctrine of the law of the case." App. D. 3.

A petition for rehearing or rehearing *en banc* was denied by the court of appeals on June 19, 1981. A motion for stay pending disposition of petition for certiorari was denied by the court of appeals on June 29, 1981, and by Justice Powell, with written opinion (attached hereto as Appendix E), on June 21, 1981.

7. The district court's 1981 decision on remand.

On remand, the district court reasoned in its most recent decision that the court of appeals "appears to have relied exclusively on statistics . . . cit[ing] the numerical racial makeup of students in 1970 compared to 1980, the number of one-race schools, and the percentage of students attending one-race schools for the same time frame." App. B. 2. Concluding that the court of appeals "apparently presumes that the past state-wide *de jure* dual system was a direct cause of the present unbalanced racial configuration," the district court stated that its understanding of the scope of the mandate was that it required a satisfactory system-wide racial mix and nothing less. App. B. 2.

Noting that from "1966 to 1981, the percentage of white students has decreased from 67.9% to 57.8%" and that the "total student population has decreased from 13,386 to 10,713, while the black population has increased," the district court concluded that "prior orders of this Court designed to provide a unitary system or produce a more favorable racial balance have been thwarted by failure of white students to attend the predominantly black schools in black neighborhoods to which they were assigned. The families of these students simply moved to areas of the school district that were left unaffected by the prior orders, or to areas outside the district . . . ." App. B. 5. The court then concluded:

> However, the law has progressed from a concept of desegregation to one of integration. While the Fifth Circuit has made little pretense in this regard, the Supreme Court has avoided adopting the principle in so many words. Regardless of the rhetoric employed, however, plans that fail to produce a sufficient degree of integration are rejected, and plans that do produce a sufficient degree of integration are approved. App. B. 7.

Continuing its analysis, the court stated that a "legal presumption" has been imposed under which "one-race schools existing today in districts that have not been declared to be unitary, are presumed to be vestiges of a dual system and caused by past or present discrimination." App. B. 11. Whereas equitable principles dictate that the constitutional violation of state-imposed segregation should be remedied by the elimination of that segregation, the court reasoned, the "body of law in the Fifth Circuit reflects the conviction that the remedy should extend to the imposition of integration." App. B. 12.

Finally rejecting all plans proposed by the parties, the court promulgated a plan which "randomly places each household family in the district in one of two feeder patterns for grades four through twelve." App. B. 13. The random selection process

was to be accomplished by some method such as "the drawing of colored beads from a jury wheel." App. B. 16.

8. The present decision of the court of appeals.

On this the first appeal by the school district, the court of appeals affirmed the order of the district court creating a student assignment plan which requires mathematically precise racial ratios in each district school. While acknowledging that "portions of the district judge's opinion read in isolation might indicate that he misinterpreted constitutional requirements, the opinion as a whole shows that he understood and fairly applied the constitutional precepts applicable to school desegregation cases." App. A. 2.

In respect of the precise mathematical racial ratios mandated by the district court for each district school by means of random lottery, the court of appeals held that "while perfect racial balance is certainly not required, the achievement of such balance is equally certainly not constitutionally prohibited." App. A. 2.

REASON FOR GRANTING THE WRIT

The district court in its 1981 decision on remand misapprehended the mandate of the court of appeals, and the precedential parameters established by this Court, as requiring the implementation of an alternate student desegregation plan that would produce an exact racial configuration in each district school absent a prior determination that present disparities in some schools are the result of discriminatory conduct on the part of the school district or the State of Texas. The court of appeals' references to the racial ratios of students in 1970 as compared to those in 1980, and to statistics delineating the number of one-race schools and the percentage of students attending those one-race schools during this ten-year period, apparently caused the district court to conclude that the court of appeals, in interpreting prior rulings of this Court, presumed the "present unbalanced racial configuration" was a result of the "past state-

wide *de jure* dual system." App. B. 2. The mandate of the court of appeals, the district court erroneously reasoned, requires "nothing less" than "a satisfactory system-wide racial mix," because "the law has progressed from a concept of desegregation to one of integration" and a "legal presumption" has been established that "one-race schools existing today in districts that have not been declared to be unitary, are presumed to be vestiges of a dual system and caused by past or present discrimination." App. B. 11.

Contrary to the holding of the district court, and to the affirmation of the court of appeals, this Court has never concluded that racially imbalanced schools in districts once segregated by law are *a fortiori* unconstitutional, or that such an imbalance requires or permits a remedy that produces a mathematically precise racial balance in each school. It is clear that such a determination would fly in the face of controlling Supreme Court decisions which make the distinction between the constitutional requirement of desegregation and a requirement of integration or racial balance. *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979); *Dayton Board of Education* v. *Brinkman*, 443 U.S. 406 (1977); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The two earlier opinions of the court of appeals made specific reference to the criteria set forth in *Swann, supra*, as the appropriate bases for considering the constitutionality of one-race schools. In *Swann* and subsequent decisions this Court has held that one-race schools are not unconstitutional *per se*, but rather are constitutionally unacceptable only if they are the products of discriminatory action by school district or state.

The 1980 decision of the district court reviewed by the court of appeals in its opinion of May 1981 held that it lacked jurisdiction to consider the government's motion for supplemental relief.

In addressing that issue the court of appeals relied on several statistical bases for the purpose of showing that the district court retained jurisdiction in order to determine whether or not a unitary school system had in fact been created. The court of appeals in its opinion of may 1981 did not intend to overturn the doctrine established by this Court that only racial imbalance which results from discriminatory conduct by the school district or the state is constitutionally violative, and must be remedied accordingly.

Under these circumstances, it is submitted that the court of appeals in its March 1983 opinion erred in affirming the district court's requirement of precise racial mixing in each district school absent allegation or proof — or finding by the district court — that discriminatory conduct was responsible for racial imbalance in some schools. The court of appeals, in affirming the district court's order, erroneously held that "while perfect racial balance (as required by the district court's order) is certainly not required, the achievement of such balance is equally certainly not constitutionally prohibited." App. A. 2. The court of appeals is correct in its conclusion that the "achievement" of perfect racial balance is not constitutionally prohibited; it is in error in its holding that the *requirement* of perfect racial balance may be ordered.

WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT A DISTRICT COURT-ORDERED STUDENT ASSIGNMENT PLAN REQUIRING "PERFECT RACIAL BALANCE" IS CONSTITUTIONALLY PERMISSIBLE.

The affirmation by the court of appeals of the district court's order requiring exact racial balance in each school is in direct conflict with applicable Supreme Court decisions. This Court has not, as the district court stated, drawn the legal conclusion that "one-race schools existing today in districts that have not been declared to be unitary, are presumed to be vestiges of a

dual system and caused by past or present discrimination," absent discriminatory action by school authorities. App. B. 11. Nor was such a determination made in either of prior opinions of the court of appeals in this case.

In its 1978 opinion the court of appeals stated that the district court's order must be judged by the criteria set forth in *Swann, supra,* where the "Supreme Court said . . . the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *United States* v. *SPISD,* 566 F.2d 1221, 1225 (1978). Quoting from *Swann,* the court of appeals said:

> [I]t should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law . . . . Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy that court that their racial composition is not the result of present or past discriminatory action on their part.

Ibid. Further, the court of appeals stated:

> In allowing the existence of one-race schools in limited situations, the *Swann* opinion emphasized that findings should be made demonstrating that their existence is not the result of present or past discriminatory action. The district court's holding that the SPISD is a "unitary" school system is not detailed enough to show us whether or not the school system meets this *Swann* requirement.

Ibid. The case was then remanded for supplemental findings of fact sufficiently specific to assure the court of appeals that the school district did in fact meet the *Swann* requirement.

In its 1981 opinion the court of appeals again referred to heretofore recited portions of its 1978 opinion as stating the applicable standard, observing that the government's position would require the school district to adopt a plan satisfying the requirements of *Swann*. *United States* v. *Texas Education Agency (SPISD)*, 647 F.2d 504, 505 (1981). Thus, both prior opinions of the court of appeals explicitly mandated compliance with *Swann's* requirement that findings must be made to the effect that any one-race schools were not the product of discriminatory action.

In *Swann* this Court emphasized that the law does not require "as a matter of substantive constitutional right, any particular degree of racial balance or mixing" and that "absent a finding of a constitutional violation" it is not "within the authority of a federal court" to order that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." 402 U.S. at 24. Indeed *Swann* makes clear that the Constitution does not require integration, but only the desegregation of schools segregated by race as the result of school board or state action:

> It does not follow that ... communities ... will remain demographically stable .... Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system .... [I]n the absence of a showing that neither the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Id. at 31-32.

In *Spencer* v. *Kugler*, 404 U.S. 1027 (1972), affirming 326 F.Supp. 1235 (D. N.J. 1971), this Court again emphasized that

the constitutional mandate of desegregation is quite distinct from a requirement of integration or precise racial balance. Citing *Spencer, supra,* in *Milliken* v. *Bradley,* 418 U.S. 717, 740-41 (1974), this Court overturned lower court decisions requiring increased integration, stating that "desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.' " Desegregation is a remedy for unconstitutional segregation only, and, therefore, is "necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746.

In *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424 (1976), in a situation similar to that obtaining in petitioner school district, the level of desegregation anticipated under a court-ordered plan was reached only in the first year of the plan's operation, and within four years of the plan's implementation the school district was again operating several racially imbalanced schools. Because the racial imbalance in those schools was not the result of "segregative actions chargeable" to school authorities, this Court held that such imbalance did not amount to a constitutional violation of the sort delineated in *Swann,* wherein the contention was denied that there is a "substantive constitutional right [requiring] particular degree[s] of racial balance or mixing." *Id.* at 434-35. In *Washington* v. *Davis,* 426 U.S. 229, 240 (1976), this Court again asserted that "predominantly black and predominantly white schools in a community is not alone violation of the Equal Protection Clause. The essential element of *de jure* segregation is a 'current condition of segregation resulting from intentional state action.' *Keyes* v. *School Dist. No. 1,* 413 U.S. 189, 205 (1973)."

In *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 413 (1977), this Court stated that the "finding that the pupil population in the various Dayton schools is not homogeneous,

standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board." After noting that many of Dayton's schools "are either predominantly white or predominantly black," this Court concluded that this "fact without more, of course, does not offend the Constitution." *Id.* at 417. It is the duty of the district court to determine whether the predominantly one-race schools are the result of a constitutional violation and, if so, to "determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy." *Id.* at 420.

In a subsequent opinion *(Dayton II)*, this Court reemphasized that "racial imbalance, we noted in *Dayton I*, is not *per se* a constitutional violation." *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979) at 531 n. 5. And in *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979), this Court made reference to *Dayton I* as the decision in which was enunciated the rule that "the remedy for the violations that had then been established . . . should be aimed at rectifying the 'incremental segregative effect' of the discriminatory acts identified." *Id.* at 465. This standard had been met, this Court held, because "both the District Court and the Court of Appeals found that the Board's purposefully discriminatory conduct and policies had current, system-wide impact — an essential predicate, as both courts recognized, for a system-wide remedy." *Id.* at 446 n. 15.

Dayton II, supra, is a recent example of supreme judicial assertion that racial imbalance is not necessarily a constitutionally proscribed condition. Section 205 of the Equal Educational

Opportunities Act of 1974, 20 U.S.C. § 1704, expresses the most recent Congressional position, providing that the "failure of an educational agency to attain a balance, on the basis of race . . . of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws." Section 401 of the 1964 Civil Rights Act, 42 U.S.C. § 2000c(b), that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance," arrives at the same conclusion.

In its 1981 decision the court of appeals stated:

> [T]he district court reasoned that it was without jurisdiction to consider the request for supplemental relief in the form of additional plans to desegregate. The court explained that this was not a 'step at a time' desegregation plan so it was unnecessary to specifically retain jurisdiction in the 1970 order . . . . Thus, having not retained jurisdiction and lacking evidence that would trigger its jurisdiction the district court found itself foreclosed by lack of jurisdiction from considering the motion for supplemental relief.

647 F.2d at 506. The remainder of this court of appeals' 1981 opinion involved a consideration of the question as to whether the district court was correct in asserting that it had not retained jurisdiction; there is no inconsistency with the court of appeals' acknowledgment early on that under *Swann* criteria the existence of one-race schools is constitutionally permissible if such schools have not come about from discriminatory conduct. The court of appeals' earlier references to statistical data which the district court in its 1981 order deemed controlling was intended, not to preclude a showing that racial imbalance in some schools was the result of factors other than discriminatory action by the school district or the state, but rather to refute the district court's position that it lacked jurisdiction to consider that question.

It is patently evident from the following emphatic language in the court of appeals' 1981 opinion that the jurisdictional question raised in the district court was under scrutiny: the "district court had jurisdiction over this matter when it entered its order of August 31, 1970 and . . . had jurisdiction in 1976 . . . [and] had jurisdiction in 1978 and has jurisdiction now . . . . Any doubts as to jurisdiction are thus removed." 647 F.2d at 509. This emphasis is further reinforced by the court of appeals next ordering the court below to comply with guidelines set out in *Youngblood* v. *Board of Instruction of Bay County*, 448 F.2d 770 (5th Cir. 1971), including retention of supervisory jurisdiction for three years and semi-annual reports to be filed by the school district.

The court of appeals' 1981 holding that the district court had retained jurisdiction referred to statistics reflecting racial imbalance as evidence of the alleged ineffectiveness of the 1970 desegregation plan in establishing a unitary system. The school board had, as the court of appeals then pointed out, a "continuing affirmative duty to disestablish the dual system." 647 F.2d at 507. However, as preamble to that statement the court of appeals quoted from *Swann* to the effect that when a desegregation plan contemplates the continued existence of predominantly one-race schools, the school board must bear the "burden of showing that such school assignments are genuinely nondiscriminatory." There is nothing implied in that "continuing affirmative duty" to suggest a mandate to eliminate all racial imbalance. Such language does require — and again this is obvious from the application of *Youngblood* guidelines — the retention of jurisdiction in order to make certain that all school assignments "are genuinely nondiscriminatory." *Ibid.*

The court of appeals' reliance on statistical data as a basis for determining that the district court retained jurisdiction is comparable to the employment of such data in *Milliken* v. *Bradley*, *supra*, where this Court stated:

> Disparity in the racial composition of pupils within a single district may well constitute a "signal" to a district court at the outset, leading to inquiry into the causes accounting for a pronounced racial identifiability of schools within one school system . . . . However, the use of significant racial imbalance . . . as a signal which operates simply to shift the burden of proof, *is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy*. (Emphasis supplied)

418 U.S. at 741 n. 19.

And the relief prayed for by the government was couched in these same terms. For example, it argued that in the 1978 remand the district court was directed to "carefully scrutinize any remaining one-race schools to determine whether their existence results from present or past discriminatory action (566 F.2d at 1225). But [the government asserted] the district court refused to subject the one-race schools projected under the 1970 plan to scrutiny under this standard." Obviously, the government's prayer and the court of appeals' 1981 order required that the court below "subject the one-race schools . . . to scrutiny" under the *Swann* standard. Or, in this Court's words, follow the "signal."

When it is understood that the court of appeals' 1981 opinion was addressing the jurisdictional question, it becomes evident that its references to statistical data do not conflict with this Court's desegregation decisions, as the district court stated. Thus, it was unnecessary — and improper — to rule as the district court did that the court of appeals had required nothing less than a "satisfactory system-wide racial mix"; that the "law has progressed from a concept of desegregation to one of integration" although "the Supreme Court has avoided adopting the principle in so many words"; and that an irrebutable presumption exists that one-race schools can only arise from official discriminatory conduct.

The court of appeals' 1981 opinion required the district court to exercise jurisdiction in the matter of the motion for supplemental relief, and then to adopt an alternate plan in satisfaction of *Swann* requirements. But *Swann* requires that before racially imbalanced schools can be deemed unconstitutional, a determination must be made that racial imbalance is the result of present or past discriminatory action by the school board or the state. This the district court did not do, nor indeed were allegations or proof offered to it to permit such a determination.

In fact, such a determination has never been made in this case. In 1976, and again in 1980, the district court found that the existing racial imbalances were the result of "a change in residential patterns" (R. 401) and not the result of a "present or past discriminatory action by the district or by Texas." 491 F.Supp. at 1183. And in its 1981 opinion the district court found only that "orders of this Court designed to provide a unitary system or produce a more favorable racial balance have been thwarted by failure of white students to attend the predominantly black schools in black neighborhoods to which they were assigned. The families of these students simply moved to areas of the school district that were left unaffected by the prior orders, or to areas outside the district . . . ." App. B. 5. But to reiterate: the district court did not make any finding that existing racial imbalance was the result of discriminatory conduct by the school district or the state, and the record in this case contains no evidence that could support such a finding.

And in order to justify the application of a district-wide remedy the district court must find, not only that discriminatory conduct on the part of the school district or the state produced the existing racial imbalance, but also that such discriminatory conduct had "current, system-wide impact" — a showing which this Court held in *Columbus, supra,* to be "an essential predicate . . . for a system-wide remedy." 443 U.S. at 466 n. 15. The district court has made no such finding in this case.

Without such a finding — or allegation or proof thereof — there is no basis on which the district court might have predicated the sweeping district-wide remedy it has imposed, a remedy in which precise mathematical racial balance has been required, contrary to the established limitations enunciated by this Court. The court of appeals erred in affirming the court-ordered application of such a plan as being constitutionally permissible under the circumstances.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted

WELLS, PEYTON, BEARD,
GREENBERG, HUNT AND
CRAWFORD

By: .....
TANNER T. HUNT, JR.
Texas Bar No. 10294000
624 Petroleum Building
P. O. Box 3708
Beaumont, TX 77704
(409) 838-2644

Attorneys for South Park
Independent School District

PROOF OF SERVICE

I, Tanner T. Hunt, Jr. hereby certify that I have served three (3) copies of the foregoing Petition for Writ of Certiorari on counsel for the parties, as provided in Rule 33, by depositing the same in the United States Mail, postage paid, to:

RICK ARNETT
Office of the Attorney General
P. O. Box 12548
Capitol Station
Austin, TX 78711

REX LEE
Solicitor General
U. S. Department of Justice
Washington, D.C. 20530

THOMAS M. KEELING
Section Chief
General Litigation Section
Civil Rights Division
U. S. Department of Justice
Washington, D.C. 20530

WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division
U. S. Department of Justice
Washington, D.C. 20530

ELMO R. WILLARD III
Johns, Willard & Hodge
330 Liberty Street, 3rd Floor
Beaumont, TX 77701

CLAYTON E. MAYFIELD
Davis, Mayfield & Baugh
328 Petroleum Building
Beaumont, TX 77701

MICHAEL R. MCGOWN
Weller, Wheelus & Green
P. O. Box 350
Beaumont, TX 77704-0350

This 27th day of May, 1983.

TANNER T. HUNT, JR.
Counsel of Record

APPENDIX A

United States of America, Plaintiff-Appellee,

v.

Texas Education Agency (South Park Independent School District), et al., Defendants-Appellants.

Parents and Students Within South Park Independent School District, et al., (Freedom of Choice), Intervenors-Appellants.

No. 81-2318.

United States Court of Appeals, Fifth Circuit.

March 1, 1983.

After remand, 566 F.2d 1221, of school desegregation case, the District Court, 491 F.Supp. 1177, again determined that it was without jurisdiction to consider government's motion for supplemental relief on allegation that desegregation plan ordered in 1970 had failed to dismantle dual school system in operation in school district. An appeal was taken. The Court of Appeals, 647 F.2d 504, again reversed and remanded. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., entered an order establishing a desegregation plan, and appeals were taken. The Court of Appeals held that school desegregation plan for school district with de facto dual school system incorporating random assignments of household families to one of two feeder patterns composed of district schools passed constitutional muster.

Affirmed.

Schools 13(12)

School desegregation plan for school district with de facto dual school system incorporating random assignments of household families to one of two feeder patterns composed of district schools passed constitutional muster.

Appeals from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, RUBIN and RANDALL, Circuit Judges.

PER CURIAM.

This is our third, and we hope final, round with this case, which is now in its teens. In 1970, the United States sued the South Park Independent School District (SPISD) to desegregate its racially dual system of student and faculty assignment. The United States District Court for the Eastern District of Texas adopted a school desegregation plan consisting of neighborhood school zones, a majority-to-minority transfer program, and various faculty and staff assignment provisions. No appeal was taken from the original order, but in 1976 the United States filed a motion for supplemental relief, alleging that the desegregation plan ordered in 1970 had failed to dismantle the dual school system in operation in SPISD. The district court denied the motion, stating that it lacked jurisdiction because the 1970 plan had created a unitary school system. This court reversed, *United States* v. *South Park Independent School District*, 566 F.2d 1221 (5th Cir.), *cert. denied*, 439 U.S. 1007, 99 S.Ct. 622, 58 L.Ed.2d 684 (1978). The circuit court noted that *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267,

28 L.Ed.2d 554 (1971), permits the existence of one-race schools in a school district only if the district shows that the presence of such schools was not the result of past or present discriminatory action. Because the district court's finding of unitariness was not accompanied by sufficient findings of fact, the appellate court was unable to ascertain whether the school district had met the test of *Swann*. Accordingly, the appellate court remanded the cause for further findings on the issue of unitariness.

In *United States* v. *South Park Independent School District*, 491 F.Supp. 1177 (E.D. Tex. 1980) (*South Park II*), the district court again determined that it was without jurisdiction to consider the government's motion for supplemental relief. The court specifically found that the fact that certain schools were currently attended by students of predominantly one race was not the result of past or present discriminatory action by the school district or the state. *Id.* at 1183. Accordingly, the district court held that the school district was a unitary one.

Again this court reversed, *United States* v. *Texas Education Agency*, 647 F.2d 504 (5th Cir. 1981) (*South Park III*), *cert. denied*, 454 U.S. 1143, 102 S.Ct. 1002, 71 L.Ed.2d 295 (1982), holding that the district court's finding that the school district was unitary was clearly erroneous. The circuit court held that the school system remained a dual one and remanded for development and implementation of a new constitutional desegregation plan.

In compliance with the mandate of *South Park III*, the district court held more hearings and developed a desegregation plan incorporating random assignments of household families to one of two feeder patterns composed of the district schools. From this order, the SPISD and Beaumont Freedom of Choice, Inc. (FOC), an intervenor group, now appeal.

While portions of the district judge's opinion read in isolation might indicate that he misinterpreted constitutional requirements, the opinion read as a whole shows that he understood and fairly applied the constitutional precepts applicable to school desegregation cases. The district judge found that the plans offered by the parties would not meet constitutional muster. They would encourage "white flight by creating safe havens in the pairing and clustering configurations. They [would] require an excessive number of school changes for children — one plan would have some students attending seven different schools in seven years — which could be as detrimental to the quality of education in this district, in the Court's opinion, as the phenomenon of white flight". These findings are not challenged as clearly erroneous and, indeed, on the record they could not be. While perfect racial balance is certainly not required, the achievement of such balance is equally certainly not constitutionally prohibited.

Our mandate in *South Park III* was as clear as words can make it: the district court was instructed to dismantle the existing dual school system at once. In its order of 1981, it has attempted to do so in a way that is clearly constitutionally permissible. Accordingly, the district court is in all things

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA

v.

TEXAS EDUCATION AGENCY
(SOUTH PARK INDEPENDENT
SCHOOL DISTRICT), ET AL

CIVIL ACTION No. B-6819-CA

MEMORANDUM OPINION AND ORDER

This suit seeking to desegregate the public schools of South Park Independent School District was filed on August 7, 1970. It has traveled a circuitous route that has left in its wake two written opinions of the Fifth Circuit, 566 F.2d 1221 (1978) and .... F.2d .... (May 28, 1981) (No. 80-1870), and two opinions of the United States Supreme Court, 439 U.S. 1007, ... S.Ct. ...., 58 L.Ed.2d 68 (1978) (denial of certiorari with dissenting opinion) and .... U.S. ...., ... S.Ct. .... (July .., 1981) (opinion denying stay.) Indeed, as this order is being written this case remains on petition for certiorari to the Supreme Court. But for the fact that, at least, Mr. Justice Powell considers denial of certiorari a foregone conclusion, a stay would have been granted and the assignment handed this Court would have been either delayed or have become unnecessary. To repeat more than this of what has preceeded this writing would be to simply rehash old litigation history that has become all too familiar to the three levels of Courts involved, the parties, and the community. Time is better spent and attention better focused to the task at hand.

THE MANDATE

The Fifth Circuit Court of Appeals in its May 28, 1981, order charged this Court with the duty to develop *and* implement a constitutional desegregation plan to be in place and in operation for the 1981-82 school year. Along with other directives and guidelines, the Circuit Court further ordered that no additional delays or extensions of time would be permitted. The reasons given in support of the issuance of the mandate are narrow in scope and quite simple — the Court appears to have relied exclusively on statistics. The Court cites the numerical racial makeup of students in 1970 compared to 1980, the number of one-race schools, and the percentage of students attending one-race schools for the same time frame. The Circuit Court apparently presumes that the past state-wide dejure dual system was a direct cause of the present unbalanced racial configuration. These comments are not made in criticism of the mandate, but in explanation of this Court's understanding of its scope. It requires a satisfactory system-wide racial mix — nothing less.

The Judge who had presided over this case since its inception found it necessary to recuse himself and transferred the case to the undersigned. Mr. Justice Powell denied the stay on July 21; this Court had begun new proceedings on July 16.

THE EVIDENCE

The evidence presented at the hearing on July 16, 1981, contained the necessary descriptive data of the makeup of the school district. The government presented, in the alternative, two plans for desegregating the schools. The hearing was then recessed for one week to give the Court an opportunity to examine the documentary evidence, to conduct an inspection of each of the schools in the district, and to permit the school district to prepare its proposals. The hearing was resumed on July 22, 1981, and the Court received in evidence plans from the school board, from Freedom of Choice, a predominately white organization previously permitted to join the case as intervenor,

and from Citizen Action Committee, a black organization which the Court permitted to intervene on July 16. The government subsequently presented yet another alternative for the Court's consideration. The evidence will not be repeated here, except as is necessary for background or explanation of the Court's order. Evidentiary findings and legal conclusions will be filed separately.

The South Park Independent School District is an "L" shaped district that, basically, encompasses the southern and western portions of the City of Beaumont, Texas. The southeastern quadrant is racially mixed and contains Bingman and Pietzsch Elementary Schools, MacArthur Middle School, and South Park High School. Many of the homes in the area reflect the grandeur of an earlier time, and South Park High School is a large, traditional, older school building, having been constructed in 1923. There is associated with the school the expected traditions, and, typical of schools of its era, it has at this time a serious parking problem. In some measure the neighborhood is in transition and is feeling the expanding influence of Lamar University. There is little new residential construction in this area of town.

The southern quadrant of the district is almost totally black and contains Blanchette, Fehl, and Price Elementary Schools, Odom Middle School, and Hebert High School. The area comprises upper-middle and middle class sections, as well as areas on the lower end of the economic spectrum. There are several low-rent housing projects and neighborhoods that contain a concentration of Blacks that fall in the category of being economically deprived. The more affluent areas are composed of Blacks employed in the professions and in the technical and service fields, and also contain a significant number of union-member workers of the local petrochemical industry.

Hebert High School, constructed in 1953, is a source of intense pride for the local black community. The school has

produced many graduates who have distinguished themselves and has been a dominant state-wide force in athletics. Prior to the 1970 desegregation order, the school produced a number of National Merit Scholars; since the entering of that order, there have been none. It would require eight to ten million dollars to bring the physical plant and its contents to a par with Forest Park High School. Included in this cost estimate is the anticipated expansion of its capacity to 1,800 students.

The west end is white and contains Amelia, Caldwood, Curtis, and Regina-Howell Elementary Schools, Marshall and Vincent Middle Schools, and Forest Park High School. The west end is the most affluent of the three sections. The growth patterns of the city are to the west, and most of the new residential construction over the past twenty years has been in this area. While upper and middle-class homes predominate, the area does contain a significant number of middle to lower-middle class citizens. Forest Park High School, constructed in 1968, is more modern than, though similar in construction to, Hebert, and is clearly the superior facility of the three high schools.

The segregated residential pattern in the portion of Beaumont that falls within the South Park Independent School District was not caused solely by the policies and practices of the school district. Clearly, the building plans of the district in the past that accommodated concentrations of residences have had some impact. However, this reason cannot be singled out for any more significance than the myriad other factors, both social and economic, that have also contributed.

The South Park Independent School District has operated since 1970 with a freedom-of-choice plan, with transportation provided to students who transfer from a school in which their race is in the majority to one in which their race is in the minority. The Judge previously assigned to this case has permitted the school board wide latitude in the formulation of policy and has demonstrated great patience in the progress, or lack

thereof, demonstrated by the school board in achieving a workable plan. Judicial restraint, deference to local authority, and encouragement to the parties to reach agreement have guided the Court's action to date. Yet, during this period of time, the school administration has provided no enhancement programs, active communication campaigns with parents, or any other incentives to insure success of its majority-to-minority transfer option. During the 1980-81 school year only 142 students, or less than one and one-half percent of the student population, elected to transfer under the rule, and many of those who did were children of teachers, who transferred to a school in the part of the district in which their parents were assigned to teach.

The school district has definitely experienced white flight. From 1966 to 1981, the percentage of white students has decreased from 67.9% to 57.8%. (Intervenor 1, Exhibit 1). The total student population has decreased from 13,386 to 10,713, while the black population has increased. (Intervenor 1, Exhibit 1). Clearly, the students leaving the school system are white. There has been a greater number of departures in each year that a Court order affecting the school district has been handed down. The lines have been long at the local private schools in anticipation of this order, and most are reported to be at capacity this fall. The predominantly white surrounding school districts have experienced rapid growth, and have provided landing strips for white flights.

Prior orders of this Court designed to provide a unitary system or produce a more favorable racial balance have been thwarted by failure of white students to attend the predominantly black schools in black neighborhoods to which they were assigned. The families of these students simply moved to areas of the school district that were left unaffected by the prior orders, or to areas outside the district, many times selling their homes at great financial sacrifice. Any plan that provides safe havens, areas where residents are immune from the forced mixing or forced

busing in which the rest of the school district is required to participate, is doomed to fail before the first school bell chimes.

The Court is persuaded that the primary complaint of the black community centers on the conviction that there has not been even-handed treatment afforded blacks by way of facilities, the quality of instruction provided, and the burdens imposed by the transportation of students to improve racial balance. To put it in terms of a community member offering testimony, "it must be a two-way street."

The Court further finds that the testimony of Mr. Ed Moore, Chairman of CAC, to the effect that the preference of a majority of the CAC members and the community blacks is to leave children of tender age in their neighborhood schools, and that blacks are more interested in quality education than racial mixing, reflects the true desires of the black citizenry. The Court finds that concern on the part of CAC, as a result of conferences with Justice Department attorneys, that the Justice Department would withhold enforcement support of any Court order entered in this case if CAC did not go along with the government on the K-3 busing proposals, was a substantial cause of the posture taken by the CAC lawyers on the question of busing young children. There was unanimity of opinion from the witnesses, including Dr. Michael Stolee, the desegregation expert called by the government, that serious implementation problems exist for the fall of 1981, and that the middle grades are all that can, as a practical matter, be effectively dealt with without causing an undue amount of disruption in the coming year.

THE PROPOSED PLANS

The plan proposed by the Freedom-of-Choice Intervenors is referred to as a "freedom-of-choice" plan conceived to eliminate forced busing. The plan contains an incentive provision similar to the St. Louis plan. Essentially, the proposal permits each

student to pay $35.00 annually into a fund that, along with contributions from the private sector, would fund partial scholarships of $350.00 annually for college or vocational training for each year that a student in the middle grades participated in the majority-to-minority transfer program.

The Court has two fundamental problems with this plan. First, this Court has no intention of imposing a price on public education. Second, the Court is persuaded that the plan has minimal likelihood of success. The plan is quite similar to the "free-transfer" practice that the Supreme Court invalidated in *Munroe* v. *Board of Commissioners*, 391 U.S. 450, 88 S. Ct. 1700, 20 L.Ed.2d 733 (1968), and the free choice plan invalidated in *Green* v. *County School Board*, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968). The Courts have concluded that such plans amount to an implicit invitation to return to the security of the old established discriminatory patterns, and that such plans delay rather than promote conversion to unitary, nonracial, non-discriminatory systems. The Fifth Circuit in *United States* v. *DeSoto Parish School Board*, 574 F.2d 804, 818 (1978), held explicitly that "the free-choice option cannot remain in a constitutionally valid plan."

The Freedom-of-Choice plan, conceptually, is the preferable plan. Properly administered, it satisfies constitutional requirements and is compatible with the holding in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 878 (1954). A plan that gives all students the unrestricted right, regardless of racial considerations, to attend the school of their choice, provides equal protection of the laws under the Fourteenth Amendment and produces a unitary system. However, the law has progressed from a concept of desegregation to one of integration. While the Fifth Circuit has made little pretense in this regard, the Supreme Court has avoided adopting the principle in so many words. Regardless of the rhetoric employed, however, plans that fail to produce a sufficient degree of integration are

rejected, and plans that do produce a sufficient degree of integration are approved. The closest the Courts have come to actually articulating this fact is in *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 200 n. 11 (1972):

> Our Brother Rehnquist argues in dissent that *Brown* v. *Board of Education* did not impose an "affirmative duty to integrate" the schools of a dual system but was only a "prohibition against discrimination" "in the sense that the assignment of a child to a particular school is not made to depend on his race. . . ." *Infra*, at 258. That is the interpretation of *Brown* expressed 18 years ago by a three-judge court in *Briggs* v. *Elliott*, 132 F.Supp. 776, 777 (1955): "The Constitution, in other words, does not require integration. It merely forbids discrimination." But *Green* v. *County School Board*, 391 U.S. 430, 437438 (1968), rejected that interpretation insofar as *Green* expressly held that "School boards . . . operating state-compelled dual systems were nevertheless clearly charged /by *Brown II*/ with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* remains the governing principle. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1,15 (1971). See also *Kelley* v. *Metropolitan County Board of Education*, 317 F.Supp. 980, 984 (1970).

The reason for the Court's extension of the basic right of equal protection of the laws to a posture generally considered to be in the nature of affirmative action has been the problem of implementation. The resistance of local authorities in the South, and later in the North, has produced of necessity the progeny of *Brown*. Simply stated, all deliberate speed was not employed, which ultimately compelled the Courts to resort to what are now referred to as the *Swann* guidelines. Whether this school district can, in the future, progress from the plan this Court adopts today to one that incorporates to some measure the mobility afforded by a modified freedom-of-choice plan, or to one which

embraces to a greater degree the neighborhood school concept, is a question that must be deferred.

The government's plans were presented by Dr. Michael Stolee, a recognized expert in the field of desegregation with extensive experience in the evaluation and formulation of desegregation plans. The government's proposed plans A and C utilize the concepts of pairing and clustering. Plan B is a magnet school concept which the government, after having presented early in the trial, subsequently withdrew, based on the opinion of Dr. Stolee that it would not work in South Park due to the apparent disinterest of the school board. The plans proposed by the school board and CAC embrace the same concepts of pairing and clustering to achieve racial balance and do not differ substantially from the government Plans A and C. The school board proposed to present the question to the community at an early date, by way of a bond issue, addressing the construction of a new high school located in a "neutral" territory, to be utilized along with Forest Park, creating a two high school district with comparable facilities. Each of the plans involves substantial busing to achieve racial balance. As the demographics contained in Defendant's Exhibit 31 visually demonstrate, there is no way to produce racial mixing in such a geographically segregated community without the transportation of students. The Freedom-of-Choice plan proposed by the Intervenor, opposed to forced busing, would produce, in order to be successful in achieving racial balance, just as much busing as any of the other plans devised by the parties or the Court.

The Court rejects the plans offered by the parties. They encourage white flight by creating "safe havens" in the pairing and clustering configurations. They require an excessive number of school changes for children — one plan would have some students attending seven different schools in seven years — which could be as detrimental to the quality of education in this

district, in the Court's opinion, as the phenomenon of white flight.

The magnet school concept is a variation of the freedom-of-choice plan, with special programs in the various magnet schools to encourage students to transfer out of their neighborhood. It has been utilized primarily in large metropolitan school districts thus far, such as St. Louis, Houston, Cincinnati, Chicago, Milwaukee, Philadelphia, Dallas, San Diego, Seattle, and Buffalo. Dr. Stolee testified that at the time of this hearing he had recommended a magnet plan for a school district similar in size to South Park. He further testified that although he initially discounted the prospects for success of magnet plans, his views had changed over the years, and that he now believed magnet plans *could* work, even in smaller school districts such as South Park. A magnet plan would have no chance for success, however, unless fully and enthusiastically supported by the school board in charge of implementing it. Dr. Stolee originally recommended a magnet plan for South Park, but withdrew that recommendation after he became convinced that the South Park school board would not adequately support it.

The Court is persuaded that the magnet concept alone will not produce the desired results in the South Park Independent School District for two reasons: (1) the size of the district, and (2) the lack of a strong commitment to the plan by the school board. The Court would expect to look favorably upon a voluntary consolidation of the South Park Independent School District and the Beaumont Independent School District wherein a city-wide magnet concept with proper backup could be implemented. Were such a consolidation to occur, the Court would be disposed to reconsider the incorporation of the magnet concept into a desegregation plan for the combined district.

THE ROLE OF SOCIAL SCIENCE

Dr. Stolee, in support of his recommendations to the Court of the government's plans, relied on the oft-cited and well-worn

1966 James Coleman Report. Studies in the area of school desegregation have proliferated. Dr. Stolee could easily have used studies by Crain, Orfield, Pettigrew and Green, or Robin and Bosco. The 1976 Coleman Study, and the works by Glazer, Armor, and Wolfe, have also been credited with influencing more recent court decisions.

The focus on the social scientist as a provider of useful information to the courts emanated from the basic premise of *Brown I* in 1954 that separate is inherently unequal and that positive effects flow from racial mixing, and from the reference in the now-famous Footnote 11 of the opinion to studies in existence at the time in support of that premise.

The reliance by the Supreme Court on social science to justify its decision has long been criticized. Professor Yudof, in "School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court," 42 *Law and Contemporary Problems* 57, 70 (Autumn 1978), succinctly expresses the major flaw in that reliance.

> "Virtually everyone who has examined the question now agrees that the Court erred. The proffered evidence was methodologically unsound. The damage of the dual school system, the systematic treatment of blacks as inferior beings, is a historical and not an empirical truth."

The expert witnesses in desegregation cases across the country have a wealth of social science data available to support any position on any question germane to the subject. Such inconclusive data limits the usefulness of the testimony to the Court. The Supreme Court has elected to impose a legal presumption a school system's past de jure segregation and an unsatisfactory present statistical racial makeup in the system's schools. One-race schools existing today in districts that have not been declared to be unitary, are presumed to be vestiges of a dual system and caused by past or present discrimination. *Keyes, supra,* 413 U.S. at 211 n. 17; *Swann, supra,* 402 U.S. at 26;

Lemon v. *Bossier Parish School Board*, 566 F.2d 985, 987 (5th Cir. 1978). The genesis for that legal presumption undoubtedly lies in the Supreme Court's frustration with the failure of more tolerable remedial orders either to effectively promote integration of the schools or to reduce the disparity between the predominantly white schools and the predominantly black schools in the quality of education offered. The intellectual justification for that presumption, however, must ultimately be grounded in social science. Given the current state of the art of social science research, the validity of that presumption remains speculative.

Straightforward application of equitable principles dictates that if the constitutional violation is state-imposed segregation, the constitutional remedy should be confined to the elimination of that segregation. The body of law in the Fifth Circuit reflects the conviction that the remedy should extend to the imposition of integration. Underlying this conviction is not only the well-founded suspicion that much of the remaining racial polarization in public schools is in fact promoted by more subtle and sophisticated practices by school districts and other governmental entities, but also the feeling that separation of the races in public schools is stigmatizing and symbolic of a time when the power structure was controlled by Whites and was hostile to relatively powerless Blacks. Under this view, to the extent that integration of the public schools removes that stigma, it is a justifiable equitable remedy for segregation.

The caste system that has been part and parcel of public education must be eliminated, if for no other reason than it has consistently, in the Court's opinion, disadvantaged a significant segment of our society — the black citizen. The remedy, therefore, must strive to achieve the goal of the removal of the stigma, and the elimination of any perceived disadvantage — but no more. Vindication of even constitutional rights must know some limits, and the high costs of federalism must be balanced against

the objectives of accomplishing desegregation. The future of public education in this country may well depend on the ultimate resolution of these competing considerations. Public education should serve more of the community than those too poor to flee or attend private schools. There must remain a measure of flexibility in remedial orders in desegregation cases, and there will remain one in this case.

THE COURT'S PLAN

The plan selected by the Court randomly places each household family in the district in one of two feeder patterns for grades four through twelve, preserves neighborhood school patterns for grades K-3, and minimizes to the extent possible the number of times a student must change schools. Under the plan, a student will attend two elementary schools, one for grades K-3 and one for 4-5; one middle school, grades 6-8; and one high school, grades 9-12. Students attending full elementary schools, Bingman, Pietzsch, and Tyrrell Park, will omit the 4-5 step and, therefore, attend only three schools for their thirteen years.

The South Park Independent School District will comprise three full elementary schools (grades K-6) — Bingman, Pietzsch, and Tyrrell Park; five elementary schools (grades K-3) — Blanchette, Caldwood, Curtis, Fehl, and Regina Howell; two elementary schools (grades 4-5) — Amelia and Price; two middle schools (grades 6-7-8) — Odom and either Marshall or Vincent (both will be utilized for the fall 1981-82 term because of space limitations); and, beginning fall 1982, two high schools (grades 9-12). There shall be two coexistent feeder patterns, assignments to which shall be determined for each household family by a random selection process. Feeder pattern No. 1 shall consist of the following schools:

K-3 — Neighborhood schools

4-5 — Amelia

6-7-8 — Odom

9-12 — High School No. 1

Feeder pattern No. 2 shall consist of the following schools:

K-3 — Neighborhood schools

4-5 — Price

6-7-8 — Vincent and Marshall for 1981, to be reduced to one facility 1982

9-12 — High School No. 2

Students attending full elementary schools, Bingman, Pietzsch and Tyrrell Park, shall enter the feeder pattern at the sixth grade level. Bingman, Pietzsch, and Tyrrell Park, appear by their racial makeup to be fully desegregated in school attendance. The court, therefore, excludes these schools from the remedial order for grades 4-5, allowing them to remain intact for grades 1-5 with neighborhood attendance zones as presently constituted.

The Court recognizes that arguments in favor of neighborhood schools have merit. Substantial time spent in traveling to and from school can disrupt the educational process, particularly for children in their earliest years of school. School is generally the first occasion for a child to spend significant time away from home. A major goal of school in the early grades is to see that the child enjoys school and develops a healthy interest in learning. Close teacher supervision, to keep the child's attention occupied, is an important element in achieving this goal. During these tender and impressionable years, the child forms an attitude toward school and education that will likely remain with him. Time spent in transit to and from school is unstructured, unsupervised time. It is a period of limbo between home and school which disjoints the two environments. Moreover, parental

participation is significantly higher when their children attend neighborhood schools than when they attend schools across town. Such participation can be of major assistance to the education development of children of tender age.

Although these benefits of neighborhood schools in a child's tender years will not legitimate a constitutionally unacceptable school attendance plan, they are appropriate factors to consider when deciding among constitutionally acceptable alternative plans. Not every school in a school district must have any particular racial ratio in order for the school district to pass constitutional muster; the continued existence of some one-race schools in a desegregated school district is permissible, if their racial composition is due to non-segregative factors. Since the new plan should eliminate all vestiges of racial segregation in the district as a whole, the Court finds that the continued existence of neighborhood primary schools is permissible to the limited extent permitted by this Order.

A major influence on the Court's determination to allow neighborhood primary schools is its conviction that the remedy for grades four through twelve will effectively eliminate the effects of all past segregation. The Court is optimistic that the community will assist the school board and school officials in achieving the purposes of this order, and that no alteration of or interference with the neighborhood scheme for primary schools will be necessary. Whether such further action by this Court becomes necessary will depend on the success of this plan. Meanwhile, the majority-to-minority transfer provision of the 1970 order will remain in effect for grades K through three in Blanchette, Caldwood, Curtis, Fehl, and Regina Howell. The school district shall implement any additional incentives deemed appropriate or practical to encourage participation in the majority-to-minority transfer program.

A bi-racial committee to the school board and the Court shall be created to assist the board and the Court in the implementation of this Order. The committee shall consist of six persons, three appointed by each intervenor, with the chair of the committee rotating at each called sitting. The chair shall not have the right to vote and a quorum shall be four persons. The committee shall meet at such times and places as the committee deems necessary. The operating expenses of the committee shall be considered litigation expenses and borne by the school district for a period of one year from the date of this Order. Such expenses shall be determined and reimbursable in accordance with established accounting principles in use by the district.

To implement the new plan in the 1981-82 school year, representatives of the school district and the bi-racial committee will jointly hold a special drawing no later than August 15, 1981. Each household family with a child or children entering grades four through eleven shall participate. The special drawing shall take place at an open meeting in a location large enough to accommodate all interested citizens who may foreseeably wish to attend.

The random selection process, or drawing, shall be conducted in a manner agreed upon by and between the school district and the bi-racial committee by the utilization of a procedure that insures random selection integrity, such as the drawing of colored beads from a jury wheel. In the event the school district and the bi-racial committee cannot agree upon a proper procedure for the random selection process, upon notification to the Court, the Court shall devise a procedure to be employed. The random selection process utilized by the school district and the bi-racial committee shall designate which feeder pattern, one or two, each participating household family in the district shall be assigned.

That assignment will determine the feeder pattern which all children in each participating household family will follow

through high school. The feeder patterns will be put into operation for grades four through eight beginning in the 1981-82 school year; for grades nine through twelve, beginning in the 1982-83 school year. Students entering grades nine through twelve will remain in their present high schools for the 1981-82 school year, subject to their option to change high school under the majority-to-minority transfer program.

During the spring semester of each year, beginning in 1982, a drawing will be held for household families with children enrolled in the third grade who have not previously participated in a drawing. As with the special drawing to be held this month, the initial assignment will determine the schools that all children in the household family in grades four through twelve will attend.

Household families moving into the school district with children in grades four through twelve, and household families transferring their children in grades four through twelve from private to public schools for the first time, will be assigned a feeder pattern on a similarly random basis.

Household families with children entering grades four and five in Bingman, Pietzsch, or Tyrrell Park in this school year will participate in the special drawing, even though their children will not enter their assigned feeder pattern until grade seven. Similarly, household families with children in grade three in those schools, who have not previously participated in a drawing, will participate in the annual drawing.

The feeder pattern arrangement for grades four through twelve offers several advantages over the proposals submitted by the parties and intervenors. First, all families in the school district will share equally in the burdens as well as the benefits of the remedial plan, by participating in the random selection process on equal terms. There will be no exceptions for any family; there will be no "safe havens" within the district.

Admittedly, students in Bingman, Pietzsch, and Tyrrell Park will not leave their neighborhood school until the sixth grade; but the racial composition of those schools raises no presumption of discriminatory impact. Although proof that a racial imbalance in school attendance in one part of a school district is due to segregation raises a presumption that racial imbalance in school attendance in other parts of the district is also due to segregation, *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 207-13, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973), where there is no racial imbalance in school attendance, there is no vestige of segregation. Because the effects of past segregation have been cured in the Bingman, Pietzsch, and Tyrrell Park areas, and because the Court should limit its equitable remedy to fit the scope of the remaining segregative impact, those areas are appropriately excluded from the feeder pattern assignments for grades four and five.

The second advantage of this plan over other proposals is its minimal disruptive impact. Once a household family is assigned a feeder pattern, the family knows which schools its children will attend from grade four through grade twelve. Each child will attend three schools during those years. Students attending school together in grade four will continue to attend school together until graduation from high school, which will preserve the stability of friendships.* The initial disruption in this regard that will occur during the 1981-82 and 1982-83 school years,

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* Students in grades six through eight in feeder pattern number two will be divided randomly between Vincent and Marshall for the 1981-82 school year. This temporary aberration in the Court's plan is permitted in deference to expressed school board wishes to preserve the middle school grouping for grades six through eight, and to the fact that the various schools in the district were designed for particular age groups and could not easily be altered. At the December 9, 1981, hearing, the school board will present a proposal to the Court for expanding the middle school facilities so that all middle school students in each feeder pattern can attend the same school.

when students will be relocated pursuant to their families' assignments, is regrettable, but inevitable without completely frustrating the goals of this plan. The one-time disruption for children entering their assigned feeder pattern in grade four, or in grade six for students in Bingman, Pietzsch, and Tyrrell Park, is a necessary result of preserving the neighborhood attendance pattern for the earlier grades.

An oft-voiced view of the black community, as expressed both in testimony before the court and in letters from black citizens, is that black children from educationally disadvantaged backgrounds have special educational needs, and that meeting those needs requires teachers and administrators with special training and understanding that can best be provided by black teachers. The thrust of this view is that, given the opportunity to apply an educational program of its own design, the black community can achieve greater progress in laying a solid educational foundation for black children in the early grades, to prepare them effectively for education in the upper grades.

The Court is of the view that the black community should be given such an opportunity. The plan implemented by the Court should, and does, contain sufficient flexibility to permit this experiment in the pursuit of excellence. In the event the CAC elects to implement such an experimental program, the entire student body of the selected school shall be black and all teachers and administrators assigned to the experimental school shall be black. The school board should defer, if possible, to recommendations from the CAC regarding the selection of teachers and administrators to be asigned to the experimental school. The school district shall monitor the progress of the experimental program and conduct appropriate testing or other educationally acceptable means to evaluate the impact of this experimental program and its effect on children participating as compared to other children, white and black, in the district. The continued

existence of the experimental program shall be subject to further orders of the Court.

This plan complies with the school board's desire to close MacArthur Middle School, which closing is based on administrative considerations that are unrelated to the racial makeup of the student body.

The Court is scheduling a hearing for 10:00 a.m., December 9, 1981, for the school board to report to the Court whether it intends to construct a new high school or to renovate the facilities presently known as South Park High School, or Hebert High School, to serve as one of the two high schools in the plan along with the facility presently known as Forest Park High School, to serve as the other high school campus. The Court shall, at such hearing, select which high school facility shall serve Feeder Pattern No. 1 and which shall serve Feeder Pattern No. 2.

Further, the Court shall, at such hearing, entertain any motions by the parties to modify the plan.

It is so ORDERED, this, the 5th day of August, 1981.

ROBERT M. PARKER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, ET AL.

CIVIL ACTION NO. 6819

John H. Hannah, Jr.
United States Attorney
Tyler, Texas

Drew S. Days, III
Assistant Attorney General
Joseph D. Rich
Daniel L. Jennings
United States Department of Justice
Washington, D.C.
Attorneys for Plaintiff United States of America

Tanner T. Hunt, Jr.
Wells, Peyton, Duncan, Beard, Greenburg, Hunt & Crawford
Beaumont, Texas
Attorneys for Defendant South Park Independent School District

Leon Pettis
Beaumont, Texas
Joe H. Tonahill
Tonahill & Hile
Jasper, Texas
Attorneys for Intervenor Parents and Students

MEMORANDUM OPINION ON REMAND[1]

Pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit, this Court held an additional hearing for the purpose of "determining whether or not the [South Park Independent School District ("SPISD" or "District")] is in fact a 'unitary' school system" and whether the reassignment of principals by the District prior to the 1977-1978 school year "was done without regard to the race of the individuals involved."[2] United States v. South Park Ind. School Dist., 566 F.2d 1221, 1225-26 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978).

Because this Court finds that its school desegregation order of 31 August 1970 ("1970 Order" or "desegregation Order") created a unitary system for the SPISD by implementing a racially neutral attendance zone for each school, it concludes that it is without jurisdiction to consider the United States' motion for "supplemental relief" seeking an order requiring the SPISD to come forward with additional plans to desegregate the students within the District. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-37 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971). The Court also finds that there is insufficient evidence to support a finding that racial considerations played any part in the reassignment of principals by the District prior to the 1977-1978 school year. Thus, it is the conclusion of the Court that the SPISD violated neither the 1970 Order nor the Constitution of the United States in the principal reassignments. *See* Singleton v. Jackson Mun.

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[1] This memorandum opinion constitutes the additional findings of fact with conclusions of law as required by the remand order of the United States Court of Appeals for the Fifth Circuit. *See* United States v. South Park Ind. School Dist., 566 F.2d 1221, 1225-26 (5th Cir. 1978).

[2] The hearing took 4 days. The testimony of 49 witnesses was heard; much undisputed statistical evidence was presented.

Sep. School Dist., 419 F.2d 1211, 1217-18 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970).

I

A

On 31 August 1970, this Court entered an order ("1970 Order" or "desegregation Order") implementing a school desegregation plan for the SPISD. The language, intent, and effect of the 1970 Order was to "establish a unitary school system in [the] . . . District." The desegregation Order provided, with one exception, for the desegregation of the student body in the District schools by a neighborhood school plan. Under the plan, attendance zones were drawn encompassing each of the three high schools, four junior high schools (now middle schools), and eleven elementary schools. As an exception to the neighborhood school concept, a majority-to-minority transfer option was included. Under this scheme, a student who is assigned to a school in which a majority of the students are of his race may elect to attend any other school in the SPISD in which members of his race are a minority. Students who elect this option are given transportation by the District to the school of their choice.[3] Further, these students are given priority for space in any school which they elect to attend — not merely the closest SPISD school in which their race is in the minority.[4]

The 1970 Order also provided for the desegregation of faculty and staff within the schools in the District. Under the desegregation Order, the ratio of Black teachers and staff to White teachers and staff in each school is within five percent (5%) of the

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[3] Although the SPISD is only required to furnish transportation if it is available from District-controlled sources, the District furnishes bus transportation to all students electing the majority-to-minority transfer option.

[4] No other specific exemptions to the attendance zones were permitted under the 1970 Order, other than for certified special education students and high school seniors in the 1971 classes at the three District high schools.

ratio of Black teachers and staff to White teachers and staff in the District.

After entry of the 1970 Order none of the parties appealed. It became final.

B

On 19 July 1976, nearly 6 years after entry of the desegregation Order, the United States moved for supplemental relief requesting that this Court order the SPISD to develop, adopt, and implement a comprehensive school desegregation plan which would satisfy the requirements of subsequent pronouncements of the Supreme Court of the United States and the United States courts of appeals in school desegregation cases.[5] No allegation was made that the SPISD had failed to comply with the 1970 Order.

On 11 August 1976, approximately 1500 parents and students ("Parents and Students") living within the District moved to intervene as a class representing themselves and others similarly situated.

A hearing was held on 16 and 19 August 1976. It was the position of the SPISD that it had remained in full compliance

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[5] The motion of the United States was preceded by a letter of 15 April 1976 from the Department of Justice to counsel for the District. The letter, the first indication that the United States was dissatisfied with the District's assignment of pupils to schools since the entry of the desegregation Order on 31 August 1970, advised that "additional steps need[ed] to be taken in order to bring the district into compliance with Federal law." That the United States would take such a position was somewhat surprising to the District as in each year since 1970 the United States Department of Health, Education, and Welfare (now Department of Education) had approved the student assignment plan being used by the SPISD administrative staff conducted an intensive study to determine whether an alternative plan might be devised which would produce greater student desegregation at certain schools. Following the study, the District concluded that the plan promulgated by the 1970 Order was the most educationally sound plan available under the circumstances.

with the terms of the 1970 Order, that agencies of the United States had consistently approved the District's implementation of the 1970 Order, that the differences in the racial composition of schools from those anticipated in 1970 when the desegregation Order was entered were the result of changed residential patterns beyond the District's control, that since 1970 the SPISD had been guilty of no segregative acts, and that the 1970 Order was the most educationally sound and constitutionally acceptable integregation plan available to the District. The United States presented oral argument in support of its motion and in opposition to the motion to intervene of the Parents and Students. Several witnesses were called by the SPISD to substantiate its position. No testimony was offered by the United States.

On 9 September 1976, an order was entered denying the motion for supplemental relief of the United States and granting the motion to intervene of the Parents and Students. This Court found that while some of the SPISD schools reflected a lesser percentage of desegregation than had been anticipated, other schools reflected a greater degree of desegregation than had been expected in 1970, and that evidence established that the desegregative results at schools differing from those anticipated in 1970 were the consequence of changed residential patterns beyond the control of the District. Moreover, it was apparent that the District had taken no affirmative action with segregative intent since 1970, nor refrained from taking any action within the scope of the 1970 Order which, if taken, would have increased the segregative results at those schools where the degree of desegregation was less than anticipated. This Court also found that the neighborhood school plan, as set out in the desegregation Order, dissolved all vestiges of a dual system. Thus, having specifically found a unitary system established by its 1970 Order, this Court concluded that it had no jurisdiction to consider the motion of the United States for supplemental relief.

The United States appealed.

C

In March of 1977, the SPISD announced that all principals would be reassigned to different schools for the 1977-1978 school year. These new assignments did not alter the level of desegregation of faculty and staff in any school inasmuch as the unintended result of the reassignments was to place White principals in positions formerly held by White principals, and Black principals in positions formerly occupied by Black principals.

On 8 August 1977, the United States filed an application for an order to show cause why the SPISD should not be required to comply with the 1970 Order insofar as it relates to the assignment of faculty and staff of the District. It was the contention of the United States that the SPISD had violated the 1970 Order by reassigning Black principals to schools which had a majority of Black students and White principals to schools in which White students were in the majority.

After hearing the application of the United States, this Court found that the racial composition of none of the SPISD schools was indicated by the principal reassignments, that the reassignments did not produce a decrease of faculty and staff integration in the District,[6] and that the SPISD had fully complied with the

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[6] The SPISD announced the reassignment of assistant principals for the 1977-1978 school year along with the principal reassignments. The two high schools with majority White student populations, Forest Park High School and South Park High School, would continue to have Black assistant principals. As in the past, the predominantly Black high school, Hebert High School, would have a White assistant principal. For the first time, a middle school populated by a majority of White pupils, MacArthur Middle School, would have a Black assistant principal. Thus, the effect of the reassignment of assistant principals for 1977-1978 was to maintain the prior level of desegregation among school building faculty and staff except at MacArthur Middle School where staff desegregation was increased by the addition of a Black assistant principal.

1970 Order in the principal reassignments. Accordingly, the application was denied.

The United States appealed.

D

On appeal to the United States Court of Appeals for the Fifth Circuit, the order denying the motion of the United States for supplemental relief (student desegregation) was joined with the order denying the United States' application for an order to show cause (principal reassignments). The court of appeals reversed and remanded for additional findings to support this Court's rulings. United States v. South Park Ind. School Dist., 566 F.2d 1221, 1225-26 (5th Cir. 1978). A rehearing *en banc* was denied. United States v. South Park Ind. School Dist., 569 F.2d 1155 (5th Cir. 1978) (table).

The Supreme Court of the United States denied certiorari. Board of Educ. v. United States, 439 U.S. 1007 (1978). Two Justices dissented. *Id.* A rehearing was denied. *Id.* at 1135.

II

In focusing attention on the issue of school desegregation by eliminating the racial identifiability of the SPISD schools, it is important to clarify exactly what this Court did *not* do in its 1970 Order. First, unlike the practice required when a court implements a "step at a time" plan, it was unnecessary for this Court in the 1970 Order to "specifically retain[] jurisdiction of [the] cause." *See, e.g.*, Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 654 (M.D. Ala.), *modified*, 400 F.2d 1 (5th Cir. 1968), *rev'd*, 395 U.S. 225 (1969) (order of district judge reinstated as entered). Nor did this Court in 1970 choose to implement a desegregation plan which would require periodic reexamination and reappraisal to determine when a unitary system finally had been obtained. Instead, from the desegregation plans submitted by the United States and the District, this Court devised a plan which, by immediately eliminating the vestiges of

a dual system, achieved for the SPISD a unitary school system and the first paragraph of the 1970 Order implementing the plan so states:

ORDER FOR IMPLEMENTATION OF SCHOOL INTEGRATION PLAN

The court having heard testimony in open hearing and having considered the arguments of counsel for the United States of America and for Defendant South Park Independent School District with respect to *the immediate implementation of a school integration plan designed to establish a unitary school system* in South Park Independent School District.

It is ordered that the Board of Trustees of South Park Independent School District proceed to implement, not later than September 2, 1970, the following desegregation plan:

(emphasis added).

A

By entry of the 1970 Order, this Court concluded that the establishment of a neighborhood school attendance plan, together with the introduction of a majority-to-minority transfer option and faculty and staff desegregation, established a unitary system. The 1970 Order was based on then current demographic information presented during the 1970 hearings and accepted by both the United States and the District. This information indicated that only two of the District's then eighteen schools were likely to retain student racially identifiability. These two schools, Blanchette Elementary School and West Oakland Elementary School (now Price Elementary School), were small elementary schools with limited attendance zones. Blanchette Elementary School served kindergarten through fourth grade students; West Oakland served students in grades one through six. The remaining schools, the three high schools, four junior high schools (now known as middle schools), and the other nine elementary

schools, would lose all vestiges of student racial identifiability under the attendance plan set out in the 1970 Order.

The importance of this finding, that the Court established a unitary system with the entry of the 1970 Order, cannot be understated. For once a court finds that a school district has achieved a unitary status, absent a further segregative act, it loses jurisdiction over the matter. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-37 (1976).

This concept is best illustrated by the recent decision of the United States Court of Appeals for the Fifth Circuit in *Lee v. Macon County Board of Education*. Lee v. Macon County Bd. of Educ., 584 F.2d 78 (5th Cir. 1978). In a proceeding in 1977 to reopen a school, a United States district court entered an order which found that the Baldwin County, Alabama school system, which had been operating under a 1970 court-ordered desegregation plan, was "desegregated and . . . unitary in nature." *Id.* at 81. No objections to the order were filed.

Subsequently, the United States and other parties intervened to prevent the school from reopening. When the intervenors were denied the relief that they sought, some of them appealed.

The Fifth Circuit first considered whether the district court had subject matter jurisdiction over the proceedings.

> Federal district courts possess jurisdiction over school desegregation cases only because of unconstitutional action by the state or by the local school board. The magnitude of the constitutional violation, the scope of the remedy required to redress the violation, and the possibility of recurring violations have all made it necessary for the district courts to retain jurisdiction over many such cases in order to insure the proper implementation of the desegregation plan and the achievement of the ultimate goal — a unitary school system in which the State does not discriminate between public school children on the basis of their race.

Id. Having established these ground rules, the court continued:

> But once that goal has been attained, the district courts may then follow the orderly procedures previously outlined by this Court and enter an order that the school system is indeed unitary.

Id. Then, applying the *Swann* decision of the United States Supreme Court, the Fifth Circuit stated:

> Normally, a court could then close the docket on the case, and "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

Id. (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971)).

B

Nevertheless, because some of the SPISD schools have reflected a lesser degree of desegregation than was anticipated under the 1970 Order, it is necessary to inquire whether either the SPISD or the State of Texas "has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the [District] schools."[7] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971). If so, the jurisdiction of this Court is again triggered to remedy the violation. *Id.* The Court is, however, unable to find any evidence presented at either the 1976 hearing or the 1979 hearing which would indicate that a deliberate action of the SPISD or of the State of Texas has affected the racial composition of any school and thus concludes that it is without jurisdiction.

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[7] Although it was the position of the District during both the 1976 hearing and the 1979 hearing that whether the SPISD had deliberately attempted to fix or alter demographic patterns to affect the racial composition of the District schools was not in issue as the United States' motion for supplemental relief had suggested no such violation, the Court was of the opinion that the United States should have an opportunity to develop this issue.

To be sure, the racial composition at several of the District schools is significantly different from that projected in 1970 when the desegregation order was entered. Yet, it cannot be disputed that the cause of this disparity is due to a change in residential patterns subsequent to the implementation of the 1970 Order. Clearly, that certain schools are currently attended by students of predominantly one race is not the result of present or past discriminatory action by the District or by Texas. Rather, the evidence establishes that this situation has come about since 1970 as the result of four factors: (1) a mass exodus of White residents from the Hebert High School, the Odom Middle School, the Fehl Elementary School, and the Tyrrell Park Elementary School attendance zones; (2) a significant and continuing decline in student enrollment coupled with an increase of almost ten percent (10%) in the proportion of Black students in the District; (3) the decision of some students to attend private schools; and (4), based on an abundance of evidence presented during the 1979 hearing, the efforts of some White parents residing in the Tyrrell Park area to avoid sending their children to Hebert High School and Odom Middle School by creating guardianships and other legal means.*

The migration of White students from the Hebert High School, the Odom Middle School, the Fehl Elementary School, and the Tyrrell Park Elementary School attendance zones was best reflected by the undisputed testimony of Professor Charles Hawkins of Lamar University. Professor Hawkins, an expert witness in economics and demographic statistics, testified that in the 9 years since the 1970 Order was entered by this Court

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* Although this phenomenon was generally limited to White parents, there was evidence presented in 1979 to indicate that some Black parents have employed these same devices to circumvent the efforts of the District to enforce the 1970 Order so that their children might attend the predominantly Black Odom Middle School and Hebert High School rather than the school in their neighborhood attendance zone.

several residential areas within the District experienced significant changes in racial composition. Professor Hawkins testified that the Fehl Elementary School attendance zone and a part of the Tyrrell Park Elementary School zone, both densely populated neighborhoods comprised primarily of single-family dwellings, had changed from predominantly White to predominately Black. Both of these neighborhoods are also within the Hebert High School and Odom Middle School attendance zone and were projected in 1970 as the White residential areas which would desegregate those particular schools. It was also Professor Hawkins' expert opinion that the construction of three major housing complexes, which are occupied predominately by Black families, has added to the racial imbalance at Hebert High School, Odom Middle School, an Fehl Elementary School. Corresponding to the changes in the Hebert High School, the Odom Middle School, the Fehl Elementary School, and the Tyrrell Part Elementary School attendance zones, Professor Hawkins believed that most of the other attendance zones within the District continued with the same racial composition as in 1970.

Professor Hawkins also presented information from the Texas Education Agency which indicated to him that since the implementation of the desegregation Order the SPISD has undergone a steady decline in overall enrollment and a steady increase in the proportion of Blacks in the student body. He testified that during this same period other area school districts with predominately White enrollments, such as Lumberton School District and the Vidor School District, experienced dramatic increases in White student enrollments. For example, the enrollment at the lumberton School District, located five miles north of the SPISD, has doubled.

The evidence presented at both the 1976 and the 1979 hearings clearly established that no action or inaction by the District since the entry of the desegregation Order had, as a natural and foreseeable consequence, a segregative effect on the student body

within any school or the District. The SPISD has since 1970 neither opened new schools nor closed existing ones which would affect the racial composition at any District school. Indeed, there was evidence presented during the 1979 hearing which established that the District had taken several steps to increase the overall level of student desegregation. The present superintendent of schools testified that the District has, for several years, rotated its secondary school summer program among the three high schools in order to increase student desegregation. He also testified that the District promotes the majority-to-minority transfer option in local daily newspapers and in the schools.

Additional action taken by the District for the purpose of increasing the level of student desegregation includes scheduling different vocational, language, and other courses in the three high schools. Students electing to attend these courses leave the high school within their attendance zone for a part of each day in order to take one or more courses offered at another District high school. For example, Black students from the Hebert High School attendance zone may take courses at Forest Park High School, a majority White school, or at South Park High School. White students from those schools may take courses at predominantly Black Hebert High School. The attendance of these students, however, is reflected only in the records of the high school within their attendance zone.

In sum, because there is no evidence to support a finding that either the SPISD or the State of Texas has attempted to alter the demographic patterns to affect the racial composition of the District schools, and, in fact, evidence to support a finding that the SPISD acted within the strictures of the 1970 Order to increase the level of student desegregation, the Court must conclude that there is no jurisdiction to alter a previously established unitary system.

C

Although the issue of compliance by the SPISD with the desegregation Order was never technically at issue during either the 1976 or the 1979 hearing,[9] since much testimony was admitted during the 1979 hearing which established that some parents and students had falsified addresses and used other means to attend either an SPISD school other than the one in their attendance zone or a public school outside of the District, the Court believes that it is necessary to determine whether the evidence can support a finding that the conduct of the SPISD in enforcing the school attendance zones violated the terms of the 1970 Order.[10] Immediately prior to the 1979 hearing, an investigation by the United States Department of Justice discovered

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[9] The motion for supplemental relief filed in 1976 did not allege noncompliance by the District with the 1970 Order. Indeed, when the Court inquired of counsel for the United States during the hearings in 1976 whether noncompliance was at issue, counsel for the United States indicated that it was not.

THE COURT: All right, I would inquire of counsel for the Government whether or not you are making the contention that the School District in some way has failed to comply with this Court's order of August 31, 1970.

MR. JENNINGS: No, sir, we are not contending that they have failed to comply . . . .

THE COURT: Now the Court would inquire — the Court doesn't wish to embarrass counsel, because maybe you had nothing to do with it at the time, but if you feel that way now, at the time you filed the motion, do you know why the Government did not feel this way in 1970, in taking an appeal from this Court's order of August 31, 1970?

MR. JENNINGS: I can't answer that.

THE COURT: You have no answer to that?

MR. JENNINGS: No, sir.

Transcript, United States v. South Park Ind. School Dist., (E.D. Tex. Aug. 16, 1976). Nevertheless, when counsel for the United States raised the issue of the District's compliance with the 1970 Order in his opening statement in the 1979 hearing, the Court, in fairness, allowed the United States to present evidence during the hearing in an attempt to develop this issue.

[10] The only evidence that could suggest noncompliance by the SPISD with the 1970 Order was that some students were attending a school

twenty-nine White students living within the predominantly Black Hebert High School and Odom Middle School attendance zone who were attending a school outside of the zone. When the parents of these children were called, their testimony was consistent. First, once the District was apprised that any of these parents had children attending a SPISD school other than Hebert High School or Odom Middle School, the children were immediately enrolled in the correct SPISD school. Second, false addresses had been employed in most cases in an attempt to circumvent the 1970 Order and the efforts of the District to enforce it. And, it was evident that the parents who sought to avoid the effect of the desegregation Order were very much aware of the District's enforcement efforts. Thus, they felt it necessary to employ various devious tactics.

When the testimony of these parents is examined in the light of the District's active policing efforts, it is impossible for this Court to find a violation of the 1970 Order by the SPISD. Several persons testified that both District school administrators and the SPISD trustees understood that they were responsible for implementing without deviation the attendance zones in the 1970 Order. The District's director of attendance assisted principals in the enforcement of the attendance zones. Each of the SPISD principals was given a map depicting the attendance zone for his school and instructions for the enforcement of the school attendance zone. Each principal checked student enrollment cards against the maps and expelled any student found to

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other than the District school for their attendance zone. No evidence was introduced which would tend to prove that the District had altered either the feeder patterns from the elementary schools through the middle schools to the high schools or the attendance zones set out in the desegregation Order. Nor was it suggested that since the entry of the 1970 Order the SPISD deviated from the mandated level of faculty and staff desegregation.

be attending school out of zone. On numerous occasions the District's director of attendance went to student's homes to verify questionable addresses.[11]

D

One additional point needs to be made. Following the 1976 hearing, this Court found that the United States' motion for supplemental relief had failed to provide notice to the SPISD of the details of any violation of equal educational opportunity or equal protection of the laws as required by section 259 of the Equal Educational Opportunities Act of 1974 ("Act"). 20 U.S.C. § 1758. In its opinion, the court of appeals apparently misinterpreted this finding to mean that the United States had failed to give the District notice of its dissatisfaction with the resulting effects of the 1970 Order. *See* United States v. South Park Ind. School Dist., 566 F.2d 1221, 1226 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978). What the Court intended to find, and does now find, was that the United States had neither pleaded nor proved that the SPISD violated either the right to equal educational opportunity or the right to equal protection of the laws of District students. Because the Court finds as it does, it is foreclosed by the language and intent of the Act from "enter[ing] . . . any order for . . . modification of [the] court-approved plan." 20 U.S.C. § 1758.

III

Having concluded that it does not have jurisdiction to consider the motion for supplemental relief, the Court turns to the contention of the United States that the SPISD unconstitutionally reassigned its principals immediately prior to the beginning of the 1977-1978 school year.

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[11] In a September 1979 inspection focusing on student assignment, the Technical Assistance Division of the Texas Educational Agency found the SPISD to be in compliance in its enforcement of the 1970 Order.

A

The Court first concludes that the reassignment of principals by the SPISD has fully complied with that much of the 1970 Order which mandates that the ratio of Black teachers and staff to White teachers and staff in each school equal, within five percent (5%), the ratio of Black teachers and staff to White teachers and staff within the District.

It was not the intention of the Court in the 1970 Order to require that a school have as its principal a person of a particular race. Rather, the 1970 Order clearly and explicitly required that the overall racial composition of each District school was determinative of its racial identifiability. It was this Court's understanding then, *see* Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970), and it is now, *see* United States v. South Park Ind. School Dist., 566 F.2d 1221, 1226 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978), that the overall racial composition of the faculty and staff of a school, rather than particular positions, was to be considered in deciding whether the school was racially identifiable. It was with this in mind that the faculty and staff portion of the 1970 Order was adopted. Thus, as it is not disputed that since the entry of the 1970 Order the ratio of Black teachers and staff to White teachers and staff in each District school has ever varied by more than five percent (5%) from the District-wide ratio, the Court must conclude that the terms of the 1970 Order have been fully complied with.[12]

B

Moreover, because this Court recognizes, as did the court of appeals, *see* United States v. South Park Ind. School Dist., 566

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[12] In each year since the implementation of the desegregation Order in 1970, the United States Department of Education (formerly Department of Health, Education, and Welfare), has determined that the SPISD was in compliance with that much of the 1970 Order relating to faculty and staff desegregation.

F.2d 1221, 1226 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978), that the assignment of principals alone may indicate the racial identifiability of a particular school or schools, this Court must also examine whether the reassignment of principals prior to the 1977-1978 school year was based upon racial considerations. The Court concludes that race was not a factor in the reassignment of principals for the 1977-1978 school year.

Testimony elicited during the hearing in 1979 established that the principal reassignments were not made on the basis of race, but rather to provide a new school superintendent with more meaningful faculty and staff evaluation from principals, to give principals who had been assigned to the same school for a number of years a new challenge, and to bring a fresh approach into various schools.

A number of factors, including experience, education, and other qualifications, were considered by the superintendent and his staff prior to making the assignments; race was not considered.

All administrators who were involved in the principal reassignments testified that neither the race of a particular principal nor the racial composition of a particular school was considered or discussed in making the reassignments. A member of the SPISD board of trustees testified that neither the race of a particular principal nor the racial composition of the student body at a particular school was considered or discussed when the board was presented with the proposed reassignments by the superintendent. She further testified that it was the policy of the District that race would not be a factor in the hiring, promotion, salary, or assignment of any employee. Indeed, all five of the Black principals who were reassigned for the 1977-1978 school year testified that they did not believe that race had been a factor in their reassignments.[13]

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[13] That each school would be assigned a principal of the same race as

When these reassignments are examined against a background of complete faculty and staff desegregation within each school, and within the SPISD as a whole, it is even more difficult to find evidence of race entering into the decision to assign a principal to a school. Since the implementation of the 1970 Order, all principals, assistant principals, teachers, teacher aides, coaches, and other staff who work directly with students consistently have been assigned so that the racial composition of a school staff does not suggest that a school was intended for Black or White students. There are Black assistant principals assigned to every SPISD high school and middle school in which the majority of the members of the student body is White; conversely, there are White assistant principals assigned to every SPISD high school and middle school in which the majority of the members of the student body is Black. As part of the summer school, which rotates among the three high schools, a Black principal has served when the program was held at Forest Park High School, a school with an attendance zone of mostly White students, and a White principal has overseen the program when it was conducted at Hebert High School, a school with an attendance zone of mostly Black students. Currently a Black principal is assigned to Regina Howell Elementary School, a predominantly White school, and a White principal is assigned to Price Elementary School, a predominantly Black school.

In sum, when the proof produced at the hearing is considered as a whole, there is insufficient evidence to indicate that race was a factor considered by the SPISD in reassigning the District principals prior to the 1977-1978 school year.

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that constituting the majority of the student body may be explained in part by the choice of school for reassignment made by each principal. None of the principals involved had requested assignment to a school in which their race was in the minority, and, in fact, most principals requested to remain at their original school where, prior to the reassignments, their race was the same as the majority of the student body.

IV

To repeat, the Court concludes that having established a unitary school system for the SPISD in 1970, it is without jurisdiction to consider alternate desegregation plans. Further, there is insufficient evidence to suggest that the reassignment of principals prior to the 1977-1978 school year was based upon racial considerations.

The Court recognizes that the decision reached today may seem incongruous to those within the community who are acutely aware of the several predominantly one-race schools within the District. It is, however, not so. Once a unitary school system has been established, our Constitution neither requires the maintenance of an ongoing racial balance in the public schools, Milliken v. Bradley, 418 U.S. 717, 740-41 (1974), nor, without more, requires the dismantling of a school which is predominantly White or predominantly Black, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977). Rather, Our Supreme Law mandates that no system be structured to segregate the races. This rule was succinctly stated by the Chief Justice shortly after this Court had entered its 1970 Order:

> Our objective . . . is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 23 (1974). Accordingly, the Constitution neither demands that a court periodically review a desegregation decree to conform to shifting residential patterns within a school district, nor, absent further segregative action by the district, places an obligation upon the court to remedy resegregation after an approved plan is implemented. Pasadena City Bd. of Educ., v. Spangler, 427 U.S. 424, 434-37 (1976).

The findings made by this Court in 1976 are reaffirmed. The motion for supplemental relief of the United States is denied. The application for an order to show cause of the United States is denied. *It is so ordered.*

SIGNED and ENTERED this the 1st day of June 1980.

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JOE J. FISHER
United States District Judge

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Unit A

No. 80-1870

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TEXAS EDUCATION AGENCY (SOUTH PARK INDEPENDENT SCHOOL DISTRICT), ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(May 28, 1981)

Before CHARLES CLARK and RANDALL, Circuit Judges, and SHARP*, District Judge.

SHARP, District Judge.

The South Park Independent School District (SPISD) desegregation case is now entering its second decade. This litigation has a protracted history and has already resulted in one judgment and opinion of this court found at 566 F. 2d 1221. Therefore, only the briefest summary of the facts of the case is necessary here. A fuller description may be found in this court's previous opinion.

* District Judge of the Northern District of Indiana, sitting by designation.

The United States has contended since July of 1976 that the 1970 desegregation plan ordered by the district court produced unacceptable levels of integration and that supplemental relief was necessary. The government's position was then, and remains, that the SPISD must adopt and implement a desegregation plan which satisfies the requirements of *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971). On September 9, 1976 the district court held the SPISD was a unitary school system from the moment it entered its original desegregation order August 31, 1970. On appeal this court reversed the district court and remanded the cause for further findings of fact. *United States* v. *South Park Independent School Dist.*, 566 F. 2d 1221 (5th Cir.), *cert. den.*, 439 U.S. 1007 (1978). There this court stated:

> In allowing the existence of one race schools in limited situations, the *Swann* opinion emphasized that findings should be made demonstrating that their existence is not the result of present or past discriminatory action. The district court's holding that the SPISD is a "unitary" school system is not detailed enough to show us whether or not the school system meets this *Swann* requirement. For this reason, it is necessary to remand this case to the district court for supplemental findings of fact in order to determine whether or not the SPISD is in fact a "unitary" school system. 566 F. 2d at 1225.

On remand, an evidentiary hearing was held on December 3-6, 1979. The testimony of 49 witnesses was heard; much undisputed statistical evidence was presented. The district court filed its memorandum opinion and order on June 6, 1980 denying the requested relief. The district court again found that its desegregation order of August 31, 1970 created a unitary school system by implementing a racially neutral attendance zone for each school. Therefore, the district court reasoned it was without jurisdiction to consider the request for supplemental relief in the form of additional plans to desegregate. The court explained that this was not a "step at a time" desegregation plan so it was

unnecessary to specifically retain jurisdiction in the 1970 order to determine when a unitary system had finally been obtained. Rather, the district court believed it had devised a plan which immediately eliminated all vestiges of the previous dual school system and created a unitary school. The court also found that there was no evidence to support a finding that either the SPISD or the State of Texas had attempted to fix or alter demographic patterns to affect the racial composition of the schools. Thus, having not retained jurisdiction and lacking evidence that would trigger its jurisdiction the district court found itself foreclosed by lack of jurisdiction from considering the motion for supplemental relief.

The district court also found that there was insufficient evidence to support a finding that racial considerations played any part in the reassignment of principals prior to the 1977-1978 school year. It is unnecessary to address this finding herein as it is subordinate to this court's conclusions on the broader issue of unitariness. The district court also held that the United States had failed to meet its burden of pleading and proof pursuant to 20 U.S.C. § 1758. This court stated in its prior opinion that "under the facts of this case, the statute [20 U.S.C. § 1758] is not controlling; but, if it were, reversal would nevertheless be mandated because the government has complied with its basic requirement." *Supra*, 566 F. 2d at 1266. The doctrine of the law of the case is firmly established, its basis being the sound policy that when an issue is once litigated and decided that should be the end of the matter. *Pickens* v. *Okolona Mun. Separate School Dist.*, 594 F.2d 433 (5th Cir. 1979), citing *United States* v. *United States Smelting, Refining and Mining Co.*, 339 U.S. 186, 198 (1950); *Morrow* v. *Dillard*, 580 F.2d 1284, 1290 (5th Cir. 1978). There has been no new life breathed into this issue by the subsequent evidence and the parties' argument here, so it remains as previously decided.

The scope of review here is controlled by Federal Rule of Civil Procedure 52. It provides that findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." F.R. Civ. Pro. 52(a). Justice Reed wrote in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) that "a finding is *clearly erroneous* when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*, (emphasis in original). This circuit has long relied on that formulation of the rule. See *Gele* v. *Wilson*, 616 F.2d 146 (5th Cir. 1980); *Amstar Corp.* v. *Dommino's Pizza, Inc.*, 615 F.2d 252 (5th Cir.), *cert. den.*, 101 S. Ct. 268 (1980); *Western Cotton Oil Co.* v. *Hodges*, 218 F.2d 158 (5th Cir. 1954). In *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, *rehearing den.*, 100 S. Ct. 186 (1979), the Supreme Court addressed the obligation of the Courts of Appeal in school desegregation cases. There the Sixth Circuit Court of Appeals found that the defendants were operating a dual school system and that the finding of the district court to the contrary was clearly erroneous. *Brinkman* v. *Gilligan*, 583 F.2d 243, 253 (6th Cir. 1978). The Supreme Court stated that the rule and duty of the Courts of Appeals are clear: it must determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are. *Dayton, supra*, at 534, n. 8. The most telling evidence introduced in this case is the attendance figures for the district schools. The appellant's burden, "under Fed. R. Civ. P. 52(a), of showing that the trial judge's findings of fact are clearly erroneous is not as heavy . . . as it would be if the case had turned on the credibility of witnesses appearing before the trial judge . . . However, regardless of the documentary nature of the evidence and the process of drawing inferences from undisputed facts, the reviewing court must apply the clearly erroneous test." *Petition of Geisser*, 554 F.2d 698 (5th Cir. 1977); citing *Sicula Oceanica, S. A.* v.

Wilmar Marine Eng. & Sales Corp., 413 F.2d 1332, 1333-34 (5th Cir. 1969); see also *Jenkins* v. *Louisiana State Bd. of Educ.*, 506 F.2d 992, 995 (5th Cir. 1975); *Burston* v. *Caldwell*, 506 F.2d 24, 26-27 (5th Cir.), *cert. den.*, 421 U.S. 990 (1975); *Galena Oaks Corp.* v. *Scofield*, 218 F.2d 217 (5th Cir. 1954). We should not, however, overturn the decision of the trial court unless we are left with the definite and firm conviction that a mistake has been made. *United States Gypsum Co., supra; Volkswagen of America, Inc.* v. *Jahre*, 472 F.2d. 557 559 (5th Cir. 1973).

Until the late 1950's the SPISD unconstitutionally operated a school system pursuant to Texas law which required black and white students and faculty assigned to separate schools. The Supreme Court first characterized school systems as "dual" or "unitary" according to their racial status in *Green* v. *County School Board of New Kent Co., Va.*, 391 U.S. 430 (1968). The court enunciated six criteria: faculty, staff, student bodies, facilities, extra-curricular activities and transportation; and in order to achieve a unitary status the school district must be fully integrated in all six respects. *Id.*, at 435. In *Columbus Board of Education* v. *Penick*, 433 U.S. 449, *reh. den.*, 100 S. Ct. 186 (1979), the Supreme Court stated that since *Brown* v. *Board of Education (II)*, 349 U.S. 294 (1955), the Columbus School Board has been under a continuous constitutional obligation to disestablish its dual school system. "Brown II was a call for the dismantling of well-entrenched dual systems and school boards operating such systems were clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system." Id., at 458-459; citing *Green, supra*, at 437-438. In *Swann, supra*, the Supreme Court said in regard to student assignments:

> No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria

> of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. *Supra*, at 26.

The board's continuing affirmative duty to disestablish the dual system is therefore beyond question. *Columbus*, *Supra* at 460; *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971); *United States* v. *Greenwood Mun. Separate School Dist.*, 406 F.2d 1086, 1093 (5th Cir.); *cert. den.*, 395 U.S. 907 (1969).

The circuit has recognized that a district court walks a narrow line between deciding whether unitary status has or has not been attained. *Fort Bend Independent School Dist.* v. *City of Stafford*, 594 F.2d 73, 76 (5th Cir. 1979). The judgment adopting the ultimate plan here was adopted in 1970, 15 years after *Brown II*. The district court subsequently held that the SPISD was converted to a unitary school system by the introduction of this desegregation plan on August 31, 1970. This court has addressed a similar suggestion in *Thompson* v. *Madison County Board of Education*, 469 F.2d 582 (5th Cir. 1974), stating:

> We are unable to comprehend the suggestion in the district court's opinion and now urged upon this court by the Board that the school system became a unitary system the moment our decree was to become effective ... If the journey from *Brown* to *Swan* and beyond has taught us anything, it is that integration does not occur merely when and because we say it should. The journey has been necessary because we have been concerned with conduct and action, not words. 496 F.2d at 686-687.

This court has made it abundantly clear in the past that a school system is not automatically desegregated when a constitutionally

acceptable plan is adopted and implemented. *Henry* v. *Charlesdale Separate School Dist.*, 579 F.2d 916, 921 (5th Cir. 1978).

Here the simple numerical evidence of student enrollment reflects the effect, or lack thereof, of the desegregation plan.[1] In the school year 1969-1970 there were approximately 13,059 students in the SPISD; of which 8,653 were white and 4,406 were minorities, 4,245 of which were black. Thus, 34% of the students were minorities, 33% being black. In the school year 1979-1980 there were approximately 11,075 students in the SPISD, of which 6,415 were white and 4,660 were minorities, 4,384 of which were black. Thus, 42% of the students were minorities, 40% being black. Prior to the time this plan was implemented in 1970 there were 15 schools out of 20 which were 90% or more one race. See Appendix A 1969-70 column. After this plan had been in effect nine years there were 11 schools out of 18 which were 90% or more one race. See Appendix A 1979-80 column. Ten of these eleven one race schools in 1979-80 were one race schools in 1969-70 and have remained so throughout. Finally, it must be noted that in 1969-70, 9,294 students attended one race schools or 71% of a student population of 13,059; in 1979-80, 8,390 students attended one race schools, or 76% of a student population of 11,075. See Appendix A columns for 1969-70 and 1979-80.

Against this background the evidence of record demonstrates convincingly that the defendants have failed to eliminate the continuing system wide effects of the prior discriminatory dual school system. The Supreme Court has stated that "the measure of the post-Brown conduct of a school board under an unsatisfied duty to liquidate a dual school system is the effectiveness . . . of the actions in decreasing or increasing the segregation caused by the dual system." *Dayton, supra,* at 538. Consequently, this

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[1] Appendix A and the figures used here are drawn from student enrollment data found in Government Exhibit # 1, admitted 8-19-76 and Government Exhibits #s 1, 2 and 10, admitted 12-6-79.

court is compelled to hold that the district court's finding that the school system is unitary is clearly erroneous because in fact the school system remains a dual one.

This circuit has addressed the necessity for the district courts to retain jurisdiction over such cases in order to insure the proper implementation of the desegregation plan and the achievement of the ultimate goal — a unitary school system. See *Lee* v. *Macon County Bd. of Educ.*, 584 F.2d 78 (5th Cir. 1978). In *Youngblood* v. *Board of Public Instruction of Bay Country*, 448 F.2d 770 (5th Cir. 1970), this court outlined the procedure necessary to the conclusion of a school desegregation case. This court there required first that the district court retain jurisdiction over the action for a period of not less than three years. During those three years the school district was required to file semi-annual reports with the district court similar to those in *United States* v. *Hinds*, 443 F.2d 611, 618-619 (5th Cir. 1970). Second, at the conclusion of those three years the district court should consider whether the cause should be dismissed. Further, the district court could not dismiss the cause without notice to the plaintiffs below and a hearing provided the plaintiffs an opportunity to show cause why the dismissal should be further delayed. Citing *Wright* v. *Bd. of Public Instruction*, 445 F.2d 1397 (5th Cir. 1971). For cases following *Youngblood* see *Lee, supra; United States* v. *Texas et al (San Felipe Del Rio Consolidated Independent School District)*, 509 F.2d 192 (5th Cir. 1975); *Calhoun* v. *Cook*, 451 F.2d 583 (5th Cir. 1971).

In denying the requested relief the district court relied on the rationale of the *Swann* opinion which states:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a

> showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. 402 U.S. at 32

This court's decision in *Youngblood* does not contradict these principles. Rather, "We were establishing [in Youngblood] a uniform rule upon which school authorities and district courts might rely for insuring proper local and judicial administration of the school desegregation process. It has never been our purpose to keep these cases interminably in court." *United States* v. *Texas et al, supra*, at 194. However, the district courts' well intended attempt to create a unitary school system by the entering of an order has proved unsuccessful.

The district court had jurisdiction over this matter when it entered its order of August 31, 1970 and contrary to its idealistic belief it had jurisdiction in 1976 when supplemental relief was sought for the plan was apparently ineffective then. See Appendix A 1976-1977 column. This court had jurisdiction in 1978 and has jurisdiction now. The district court had jurisdiction to carry out the 1978 mandate of this court and has jurisdiction to carry out the mandate entered here and now. Any doubts as to jurisdiction are thus removed. Therefore, in light of the 1970 plan's failure to disestablish the dual school system, this cause is remanded to the district court to develop and implement with the assistance of the parties a new constitutional desegregation plan. This plan shall be in place and operation for the 1981-1982 school year. Nor shall any further extension of time be permitted. Finally, the district court shall comply with the administrative guidelines laid out by this court in *Youngblood* and its progeny. REVERSED AND REMANDED.

STUDENT ENROLLMENT
SOUTH PARK INDEPENDENT SCHOOL DISTRICT

SCHOOL	1968-1969			1969-1970			1971-1972			1976-1977			1979-1980		
	Black	White	% Black	Black	White	% Black	Black	White	% Black	Black	White	% Black	Black	White	% Black
Forest Park High School	54	1622	3	31	1720	2	34	1698	2	36	2019	2	48	1878	3
Hebert High School	1159	0	100	1156	0	100	1188	1	99	1209	2	99	1152	1	99
South Park High School	99	840	11	131	1102	11	190	913	17	331	502	40	345	373	48
MacArthur Middle School	134	834	14	96	503	16	176	330	35	274	310	47	210	237	47
Marshall Middle School	3	600	5	0	604	0	11	632	2	6	577	1	10	519	2
Memorial Middle School	39	822	5	15	836	2	47	798	6	Unavailable			Unavailable		
Vincent Jr. High										31	696	4	44	682	6
Odom Middle School	850	0	100	868	0	100	734	0	100	814	1	99	758	4	99
Amelia Elementary Sch.	40	1127	3	11	1102	1	59	910	6	37	879	4	41	994	4
Bingham Elementary School	98	421	19	80	359	18	95	340	22	107	249	30	113	190	37
Blanchette Elementary	537	0	100	668	17	97	574	0	100	550	0	100	505	2	99
Caldwell Elementary School	3	334	9	1	326	3	62	402	13	36	352	9	54	291	16
Curtis Elementary Sch.	17	568	3	4	625	6	58	496	11	39	641	6	31	598	5
Fehl Elementary Sch.	106	278	28	130	235	36	410	20	95	326	21	94	364	24	94
Giles Elementary Sch.	207	140	60	212	71	75	147	127	54	20	19	51			
Hollywood Elementary	132	0	100	85	0	100		Closed			Closed			Closed	
Pietzsch Elementary	69	576	11	48	592	8	124	352	26	151	324	32	191	222	46
Regina Howell Elementary	2	395	5	0	352	0	38	412	8	37	279	12	29	307	9
Southerland Elementary	166	0	100	191	0	100	131	32	80	Unavailable			9	4	69
Tyrell Park Elementary	26	230	10	17	209	8	34	196	15	61	139	31	82	88	48
West Oakland Elementary	511	0	100	501	0	100	418	0	100	Unavailable			Unavailable		
Price Elementary School										382	0	100	398	1	99

APPENDIX E

Supreme Court of the United States

Nos. A-5 AND A-33

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, APPLICANT,
A-5 v.
UNITED STATES. ON APPLICATIONS FOR STAY.

GERALDINE HUCH ET AL., APPLICANTS,
A-33 v.
UNITED STATES.

[July 21, 1981]

JUSTICE POWELL, Circuit Justice.

A school district in Beaumont, Tex., and a group of intervenor parents, children, and citizens have requested me as Circuit Justice to stay the mandate of the Court of Appeals for the Fifth Circuit pending disposition of their petition for a writ of certiorari. The Court of Appeals ordered the District Court to prepare and implement a desegregation plan to operate during the 1981-1982 school year. For the reasons stated below, I must deny the motion.

Much of the history of this lawsuit is set out in *South Park Independent School District* v. *United States*, 439 U. S. 1007 (1978) (REHNQUIST, J., dissenting from the denial of certiorari). In brief, prior to 1970, the applicant maintained a dual school system based on *de jure* racial segregation. In that year the District Court entered a school integration plan that was accepted by all parties. The plan established racially neutral attendance zones for each school and included a provision allowing any student to transfer from a school where his race was in the majority to one where it was in the minority.

In 1976, the United States filed a motion for supplemental relief, alleging that a dual system still existed in fact. The District Court denied relief, holding that its 1970 order had created a unitary school system and finding that the present racial concentrations in the school district were the result of shifting residential patterns, the transfer of some pupils to private schools, and other factors beyond the control of the school district. It held that it no longer retained jurisdiction over the case and that the United States must file a new complaint if it seeks further relief.

The Court of Appeals reversed. 566 F. 2d 1221 (1978). Relying on *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 26 (1971), it held that the District Court's findings were insufficient to show that the predominance of substantially one-race schools was not the result of past or present acts of intentional discrimination. The court remanded to the District Court to hold further hearings on the question whether the school district is now a unitary system. This Court denied certiorari. 439 U. S. 1007. Two Justices dissented, suggesting that the case presented an important issue whether *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976), precluded continuing jurisdiction by the District Court where all parties had acquiesced in a desegregation plan 6 years previously.

On remand the District Court held an evidentiary hearing and made findings of fact. It found that the 1970 order created a unitary school system by implementing a racially neutral attendance zone for each school and that the court was now without jurisdiction to entertain a motion for supplemental relief. The court recounted at length evidence tending to show that the "lesser percentage of desegregation that had been anticipated" was caused by demographic changes and parental resistance. The court found no evidence that the school district had committed any act of intentional discrimination, but rather

that the authorities had implemented the 1970 plan in good faith.

The Court of Appeals again reversed. — F. 2d — (1981). It held that the District Court's finding that the implementation of the 1970 order had created a unitary school system was clearly erroneous. In reaching this decision, the court compared statistics concerning the racial composition of schools in the district in the 1969 and 1979 school years. These statistics indicate that there has been little lasting progress in achieving schools with balanced pupil populations. In 1969, 15 of 20 schools in the district had student populations 90% or more of one race; in 1979, 11 of 18 still were 90% or more of one race. The percentage of blacks in the system rose from 33% in 1969 to 40% in 1979. The court held that the District Court retained jurisdiction because these figures proved that the school authorities "had failed to eliminate the continuing system wide effects of the prior discriminatory dual school system." *Id.*, at —.

The standards for granting a stay of mandate pending disposition of a petition for certiorari are well established:

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL J., in chambers).

I cannot conclude that there is a "reasonable probability" four Members of the Court will vote to grant certiorari. The issues presented by petitioners are almost identical to those presented 3 years ago, when the Court voted to deny certiorari. Indeed, much of the school board's argument for granting a stay merely incorporates by reference JUSTICE REHNQUIST's opinion, joined

by me, dissenting from the denial of certiorari at that time. Because this argument did not persuade the Court then, I cannot predict responsibly that it will persuade the Court now.

Speaking for myself, I believe that the case in its present posture merits review by this Court. The Court of Appeals, relying exclusively on statistics comparing 1969 and 1979, rejected with little explanation the District Court's finding of fact that the implementation of the consensual 1970 plan had created a unitary school system, and that the degree of segregation existing in 1980 was caused, not by any discriminatory action by the school authorities, but by demographic changes in the public school population and by private parental choice. The statistics relied on by the Court of Appeals do not address the legal effect of the implementation of 1970 order or the legal cause of the degree of present imbalance. These latter questions should determine whether the District Court retains jurisdiction over the local schools.

It seems to me that the Court of Appeals may have erred as a matter of law in failing to give appropriate recognition to the District Court's factual findings as to the cause of the lack of present integration. *Pasadena* made clear that once a unitary school system has been attained, the District Court no longer has jurisdiction to continue its oversight, respond to enevitable demographic changes, and attempt by judicial decree to maintain for an indefinite time what it perceives to be a desirable racial mix in the schools. This is not to say, of course, that a federal court should not respond forcefully to proof of fresh or continued racial discrimination.

In sum, it seems to me that there is an impasse between the District Court and the Court of Appeals as to the meaning of our decision in *Pasadena*. This is an important question of law. For this reason, I expect to vote to grant certiorari. Yet, I cannot say with confidence that the requisite number of other Justices will join me. Accordingly, the request for a stay is denied.